

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

No. 306847
Macomb Circuit Court
LC No. 2010-002531-FH

CHRISTIAN PHILLIP MARGOSIAN,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 306850
Macomb Circuit Court
LC No. 2010-002532-FC

v

CHRISTIAN PHILLIP MARGOSIAN,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 306851
Macomb Circuit Court
LC No. 2010-000571-FH

v

CHRISTIAN PHILLIP MARGOSIAN,
Defendant-Appellant.

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of five total charges, arising from three separate cases that were consolidated for trial. In LC No. 2010-002531-FH, the jury convicted defendant of aggravated indecent exposure, MCL 750.335a(2)(b), for which he was sentenced to 200 days'

imprisonment. In LC No. 2010-002532-FC, the jury convicted defendant of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and indecent exposure by a sexually delinquent person, MCL 750.335a, for which he was sentenced to concurrent prison terms of 57 to 120 months for the assault conviction, and 180 to 360 months for the indecent exposure conviction. In LC No. 2010-000571-FH, the jury convicted defendant of carrying a concealed weapon (“CCW”), MCL 750.227, and felonious assault, MCL 750.82, for which he was sentenced to concurrent prison terms of 23 to 60 months for the CCW conviction, and 23 to 48 months for the assault conviction. The court ordered defendant’s sentence in LC No. 2010-000571-FH to be served consecutively to and preceding his sentences in LC Nos. 2010-002531-FH and 2010-002532-FC. Defendant appeals as of right in all three cases. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant’s convictions arise from three separate criminal episodes involving three different women. The prosecution presented evidence that on August 13, 2009, defendant followed JF, who was driving alone, to her Chesterfield Township home. Defendant blocked her car with his vehicle after she parked, exited his vehicle, pounded on her car window with a knife, and pulled his shirt tight to expose what appeared to be the butt of a handgun. JF escaped by driving over the lawn. She contacted the police, who stopped defendant and found two knives in his car. On December 13, 2009, defendant followed JF-II, who was driving alone in her car, to the parking lot of her Sterling Heights apartment complex and blocked her car after she parked. Defendant exited his car, exposed himself to her, pushed her down, and tried to remove her pants, but then fled when she screamed. Two days later, on December 15, 2009, defendant followed AB, who also was alone in her car, to her Sterling Heights home and parked in front of AB’s driveway. Defendant called AB over to his car, exposed himself to her, and fondled himself in front of her. AB, who recognized defendant from high school, fled from defendant’s car and contacted the police. In addition to these charged offenses, the prosecution presented evidence of two other incidents that occurred approximately a week before the first charged incident. In those incidents, which occurred within an hour of each other, defendant followed two women who were driving alone in their cars. He shouted vulgar and sexually explicit comments to one woman after she parked and exited her car. The second woman was able to evade defendant while driving. At trial, the defense presented an alibi defense and asserted that defendant was misidentified in each incident. The jury convicted defendant on all charges.

In August 2011, a separate trial was held to determine whether defendant’s offense of indecent exposure committed in LC-10-2532-FC was committed by a sexually delinquent person, MCL 750.10a and MCL 767.61a. Excerpts from transcripts from defendant’s March 2011 trial were read to the jury. On August 22, 2011, a jury convicted defendant of having committed the offense as a sexually delinquent person. As a consequence of this determination of defendant’s status as a sexually delinquent person, the trial court in October 2011 sentenced defendant to prison for 180 to 360 months for his indecent exposure by a sexually delinquent person conviction, as charged in LC No. 2010-002532-FC, along with the other sentences listed above.

II. MOTION FOR JOINDER

Defendant first argues that the trial court erred in granting the prosecution's motion to join all three cases in one trial pursuant to MCR 6.120(B)(1)(c). We disagree. Whether joinder is appropriate is a mixed question of fact and law. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). To determine whether joinder is permissible under MCR 6.120(B)(1), a trial court "must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *Id.* This Court reviews the trial court's factual findings for clear error and its interpretation of the court rule, which is a question of law, de novo. *Id.* The trial court's ultimate decision on permissive joinder of related charges lies "firmly within the discretion of trial courts." See *People v Breidenbach*, 489 Mich 1, 14; 798 NW2d 738 (2011). Thus, if the trial court's determination that offenses are "related" under the court rule is not based on clearly erroneous fact-finding or the misinterpretation of court rules or statutes, we review the trial court's decision to join or sever cases for an abuse of discretion. *Id.*

MCR 6.120(B) provides, in pertinent part:

On . . . the motion of a party . . . the court may join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

* * *

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

We agree that joinder of the offenses was appropriate under MCR 6.120(B)(1)(c). Our Supreme Court has stated that offenses are "related" for purposes of joinder under MCR 6.120(B)(1)(c) when the evidence indicates that the "defendant engaged in ongoing acts constituting parts of his overall scheme or plan." *Williams*, 483 Mich at 235. Here, the evidence indicated that defendant engaged in ongoing acts related to his scheme of preying on unaccompanied women driving in vehicles, in the same general geographic area, for purposes of sexual gratification. In each case defendant targeted a female driver who was alone in her vehicle. Defendant followed each unaccompanied female victim for a distance, often driving erratically to keep up with her, until she parked her vehicle. In each case, the victim's final destination was a residence, either a house or an apartment complex. After each victim parked, defendant initiated contact with her, and either assaulted the victim or exposed himself to her. For each offense, defendant presented alibi testimony and argued misidentification. There was little potential for confusion because all three cases were presented distinctively, and the facts

were not complex. Contrary to what defendant argues, evidence of his acts against each victim would have been admissible in each other victim's case under MRE 404(b) if the cases had been tried separately, because of the presence of a common scheme or plan.¹ Although one of the offenses was committed in August and the other two were committed in December, temporal proximity is not required to establish a single scheme or plan under MCR 6.120(B). See *Williams*, 483 Mich at 241 n 18. Finally, defendant has not established prejudice.² Consequently, the trial court did not clearly err in finding that the offenses were related and, accordingly, did not abuse its discretion in joining the offenses for trial.

III. OTHER ACTS EVIDENCE

Defendant next argues that the trial court abused its discretion when it allowed the prosecution to introduce, pursuant to MRE 404(b), evidence of the two uncharged prior acts of defendant following two female drivers, AZ and CP, on August 7, 2009. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id.* (citation omitted).

"At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002); see also *People v Mardlin*, 487 Mich 609, 616; 790 NW2d 607 (2010) ("the rule is not exclusionary, but is inclusionary"). Although MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, it permits such evidence 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." See MRE 404(b)(1); *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Other acts evidence is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v*

¹ "The admissibility of evidence in other trials is an important consideration because '[j]oiner of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial.'" *Williams*, 483 Mich at 237 (citation omitted).

² We note defendant's attempt to separate the "weapons" case from the "sexual assault" cases. In doing so, however, defendant dismisses his common conduct of targeting female victims, following the victims until they parked, and making unwanted and assaultive contact with them. The fact that the resulting charges from defendant's common conduct varied somewhat in each case should not be dispositive. As the trial court aptly noted, "the . . . focus is on whether the relevant facts demonstrate related offenses, i.e. a series of acts constituting parts of a single scheme or plan."

VanderVliet, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

We agree that the evidence was relevant to disputed factual issues in this case and was not offered to show defendant's bad character. "A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011). In *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000), our Supreme Court explained 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." See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted 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." *Sabin*, 463 Mich at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine*, 467 Mich at 251; see also *Sabin, supra* at 64-65. But "distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Hine*, 467 Mich at 252-253; *Sabin*, 463 Mich at 65-66.

Here, the evidence was probative of defendant's common scheme, plan, or system of preying on similarly situated female drivers, as well as his identity. The commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar to establish a scheme, plan, or system in doing an act. Both the prior acts and the charged offenses include a concurrence of common features that defendant utilized against female drivers. While driving in a geographical area near his residence, defendant targeted women who were alone in their vehicles and intentionally followed the women, intending to have inappropriate contact with them. In the uncharged acts, defendant drove the same car used in one of the charged offenses, followed AZ until she parked, blocked her vehicle and, after she exited her car and headed toward an apartment, yelled vulgar and sexually explicit comments to her. Minutes later, CP left the same apartment complex, driving alone, and defendant followed her, but she was able to elude defendant. The commonality of the circumstances of the other acts evidence and the charged offenses are sufficiently similar that the jury could infer that defendant had a scheme, plan, or system that involved targeting unaccompanied female drivers to accomplish unconsented sexual contact.

Further, we are not persuaded that the evidence should have been excluded because it was unduly prejudicial. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Cameron*, 291 Mich App at 610. MRE 403 is not intended to exclude "damaging" evidence, because any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Instead, under the balancing test of MRE 403, this Court must first decide if the prior bad-acts evidence was unfairly prejudicial, and then "'weigh the probativeness or relevance of the evidence' against the unfair prejudice" to determine whether any prejudicial effect substantially outweighed the probative value of the evidence. *Cameron*, 291 Mich App 611. Unfair prejudice exists where there is "a danger that marginally probative evidence will be

given undue or pre-emptive weight by the jury” or “it would be inequitable to allow the proponent of the evidence to use it.” *Mills*, 450 Mich at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). In the latter circumstance, unfair prejudice “refers to the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *Cameron*, 291 Mich App 611 (citation omitted).

Although defendant contends that evidence of “repeated conduct” depicting him as a sexual predator is inherently prejudicial, we are not persuaded that the jury would not have been able to rationally weigh the evidence. Defendant’s misidentification and alibi defenses enhanced the probative value of the evidence, which tended to shed light on the likelihood that defendant committed the crimes. Moreover, the trial court gave a cautionary instruction to limit the potential for any prejudice.³ Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We conclude that the trial court’s decision to allow the evidence did not fall outside the range of principled outcomes. *Feezel*, 486 Mich at 192. Thus, the court did not abuse its discretion by permitting the evidence.

IV. SENTENCE – SEXUALLY DELINQUENT PERSON

Defendant argues that the trial court erroneously imposed a term of imprisonment under the legislative sentencing guidelines, MCL 769.34 *et seq.*, instead of imposing the required indeterminate sentence prescribed by MCL 750.335a(2)(c) for his conviction of indecent exposure by a sexually delinquent person. We review questions of statutory interpretation *de novo*. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007).

Under the Michigan sentencing guidelines, MCL 769.34 *et seq.*, “the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.” MCL 769.34(2). As defendant recognizes, the offense of indecent exposure by a sexually delinquent person is a Class A felony enumerated in part 2 of chapter XVII. See MCL 777.16q. Conversely, the indecent exposure statute, MCL 750.335a, indicates that “[i]f the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.” MCL 750.335a(2)(c).

In *People v Buehler*, 474 Mich 1081; 711 NW2d 335 (2006), our Supreme Court remanded the case to this Court to consider, *inter alia*, “whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a.”

³ Within this issue, defendant suggests that the trial court’s limiting instruction was “weak” and “vague.” However, by expressly assenting to the trial court’s instructions as given, defense counsel waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). A waiver extinguishes any error, leaving no error to review. *Id.* at 216.

In *People v Buehler (On Remand)*, 271 Mich App 653, 659; 723 NW2d 578 (2006), rev'd on other grounds 477 Mich 18 (2007) (*Buehler II*), this Court held that the more recently enacted legislative sentencing guidelines controlled any sentence for a defendant's conviction of indecent exposure as a sexually delinquent person. This Court noted that "2005 PA 300, which amended MCL 750.335a immediately effective December 21, 2005, retained the specific indeterminate sentence of one day to life imprisonment." *Buehler II*, 271 Mich App 659 n 4. Applying rules of statutory construction, the *Buehler II* Court stated:

It is a well-settled tenet of statutory construction that when a conflict exists between two statutes, the one that is more specific to the subject matter generally controls. However, it is equally well settled that among statutes that are *in pari materia*, the more recently enacted law is favored. The rules of statutory construction also provide that inconsistencies in statutes should be reconciled whenever possible.

Applying these rules to the instant case so as to reconcile the statutes at issue as nearly as possible, we find that even though even though MCL 750.335a is more specific with respect to the term of imprisonment that may be imposed for a conviction of indecent exposure as a sexually delinquent person, the intent of the Legislature is best expressed in the more recently enacted sentencing guidelines, which are therefore controlling when a trial court elects to impose imprisonment for such a conviction. [*Buehler II*, 271 Mich App at 658-659 (citations omitted).]

Thereafter, in *Buehler*, 477 Mich 18, our Supreme Court, although reversing this Court on other grounds, stated that it "agree[d] with the panel in *Buehler II* that the Michigan Sentencing Guidelines control over the version of MCL 750.335a in force when defendant committed his crime." *Buehler*, 477 Mich at 24 n 18. Regarding the fact that the *Buehler* defendant's offense occurred before the 2005 amendment of MCL 750.335a, the *Buehler II* panel stated:

[We] express no opinion regarding whether a court is bound when sentencing person convicted of indecent exposure as a sexually delinquent person after the effective date of 2005 PA 300 by the legislative sentencing guidelines or the more specific indeterminate sentence of one day to life again expressly mandated under the version of MCL 750.335a now in effect. [*Buehler II*, 271 Mich App at 659 n 4.]

The Supreme Court agreed that it was "unnecessary to determine whether the recent amendment of MCL 750.335a, 2005 P.A. 300, has altered this conclusion for future offenders." *Buehler*, 477 Mich at 24 n 18.

After the 2005 amendment of MCL 750.335a, the Legislature amended MCL 777.16q. See 2006 PA 164, effective August 24, 2006. In that amendment, the Legislature reaffirmed that the offense of indecent exposure by a sexually delinquent person is a Class A crime and "a felony enumerated in part of Chapter XVII." MCL 769.34(2).

Based on the foregoing, we agree with the trial court and plaintiff that defendant was properly sentenced under the legislative sentencing guidelines. As the trial court aptly noted, the reasoning in *Buehler II* has not been overruled. Further, had the Legislature intended to remove the offense of indecent exposure by a sexually delinquent person from MCL 777.16q in 2006, it could have done so. The Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *People v Ramsdell*, 230 Mich App 386, 393; 585 NW2d 1 (1998). For these reasons, we affirm defendant's sentence of 180 to 360 months' imprisonment for his conviction of indecent exposure by a sexually delinquent person. See MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

V. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Specifically, defendant argues that: (1) he was denied the effective assistance of counsel at trial; (2) he was denied due process by a fraudulent police investigation; (3) the trial court erred by admitting JF-II's identification of him; and (4) the prosecution erred by charging him as a sexually delinquent person.

A. EFFECTIVE ASSISTANCE OF COUNSEL

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, or move this Court to remand for an evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Sabin*, 242 Mich App at 658-659. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

1. FAILURE TO FOLLOW DEFENDANT'S INSTRUCTIONS

Contrary to what defendant asserts as a basis for many of his claims, defense counsel was not ineffective for failing to act in accordance with defendant's instructions. Decisions about defense strategy, including what arguments to make, what evidence to present, whether to call witnesses, and how to impeach witnesses are matters of trial strategy, *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and "this Court will not second-guess defense counsel's judgment on matters of trial strategy." *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). As discussed below, defendant has not identified any omission that prejudiced his case.

2. FAILURE TO PRESENT “NEWLY DISCOVERED EVIDENCE”

Although defendant refers to alibi witness Brandon Sinawi’s December 2009 credit card statement, a statistical sheet for the Joe Dumars Fieldhouse, and a cellular phone disclaimer as “newly discovered evidence,” defendant states that these items were in defense counsel’s possession during trial. Therefore, the evidence cannot be considered newly discovered. See *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citation omitted). Further, even assuming that defense counsel possessed these items, defendant has not established that defense counsel was ineffective for failing to present them at trial.

Defendant has not established that Sinawi’s credit card statement and statistical sheets would have added anything of value to defendant’s alibi evidence. Sinawi testified that he was at the Joe Dumars Fieldhouse on December 13 from 5:20 until 9:15 p.m., and that defendant was there also. The prosecution never challenged Sinawi’s whereabouts on that date or his presence at the fieldhouse. It only contested defendant’s presence at the fieldhouse. Additional evidence to support that Sinawi was at the fieldhouse, but providing no basis for showing that defendant was also there, would have done little to enhance the alibi defense. Therefore, defendant has not shown that defense counsel’s decision not to present the evidence was objectively unreasonable, or that, but for counsel’s failure to do so, it is reasonably probable that the result of the trial would have been different. *Armstrong*, 490 Mich at 289-290.

Defendant also contends that, in challenging the cell phone record evidence used to pinpoint defendant’s whereabouts, defense counsel should have presented a disclaimer for cell phone records that “this information is often inaccurate or incomplete” and that “cell phone towers do in fact bounce signals.” During trial, defense counsel cross-examined the detective at length and elicited that a call could go to either of two towers that are relatively close. During defense counsel’s questioning, the detective explained various reasons that a call could shift or be pulled from a tower, and acknowledged that “[i]t’s not an exact science” and “it’s not definitive at any moment.” The record does not support defendant’s claim that defense counsel’s method of addressing the matter was objectively unreasonable or that the jury was deprived of any additional significant evidence that reasonably could have affected the outcome of trial. *Armstrong*, 490 Mich at 289-290.

3. FAILURE TO CALL FIVE ADDITIONAL WITNESSES

Defense counsel called five defense witnesses. Defendant now argues that defense counsel should have also called his parents, his former girlfriend, and two friends, Greg Scheppler and Travis Alias. As noted, defense counsel’s decisions regarding whether to call witnesses are presumed to be matters of trial strategy, *Rockey*, 237 Mich App at 76, and the failure to present a witness can constitute ineffective assistance only where it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defendant has not demonstrated how the proffered witnesses were valuable to his defense, and he has not overcome the strong presumption that counsel chose not to call these additional witnesses as a matter of trial strategy. Other than providing general character testimony, defendant does not state what new helpful information his parents could have offered that would have affected the outcome of the trial. With regard to Scheppler and Alias, their proposed testimony would have been cumulative to the testimony of Sinawi that defendant was

at the Joe Dumars Fieldhouse on December 13. Finally, there is no record evidence that defendant's former girlfriend was both available and willing to testify favorably on defendant's behalf. In fact, defendant has not provided a witness affidavit from her or any other witnesses, or identified any other evidence of record establishing that they actually could have provided favorable testimony at trial. Absent such a showing, defendant has not established the factual predicate for his claim, much less that he was prejudiced by defense counsel's failure to call the witnesses at trial. See *Hoag*, 460 Mich at 6.

4. "PERFECT ALIBI DEFENSE"

With little analysis, defendant cursorily argues that, based on *People v Loudenslager*, 327 Mich 718, 726; 42 NW2d 834 (1950), he was deprived of the effective assistance of counsel "by [defense counsel] not instructing the jury on the, [sic] 'Perfect Alibi Defense'" "before any testimony was said on behalf of the defense." In brief, *Loudenslager* simply does not support defendant's claim. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). We note, however, that the trial court instructed the jury on defendant's alibi defense in accordance with CJI2d 7.4. Defendant has not sustained his burden of demonstrating that defense counsel was ineffective with respect to this issue. See *Loudenslager*, 327 Mich at 726.

5. IMPEACHMENT OF JF-II AND AB

Defendant appears to argue that defense counsel did not adequately impeach JF-II's and AB's credibility with prior testimony at the preliminary examination. The record discloses that defense counsel used both witnesses' prior testimony to discredit them at trial. In fact, defendant acknowledges in his brief on appeal that, during trial, defense counsel "showed both [JF-II] and [AB] there [sic] conflicting statements more than once and often." Defendant does not indicate what other questions counsel should have asked to further "raise the issue of impeachment" and undermine the witnesses' credibility. The record does not show that defense counsel's impeachment efforts were objectively unreasonable or prejudicial.

6. "RULE 33 MOTION"

Defendant argues that defense counsel was ineffective for failing to file a "Rule 33" motion based on his "ignorance of the law." Under the federal rules of criminal procedure, "Rule 33" permits a federal district court to vacate a judgment and grant a new trial "if the interest of justice so requires." Fed R Crim P 33(a). Defendant was not tried or convicted in federal court, so defense counsel would have no reason to file a "Rule 33" motion. Counsel cannot be deemed ineffective for failing "to advocate a meritless position." See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Even if this Court considers this claim under state law, defendant has presented no case law or facts that would support vacating the judgment and granting a new trial. *Goolsby*, 419 Mich at 655 n 1.

B. DECEPTIVE POLICE INVESTIGATION

Defendant next argues that members of the Sterling Heights Police Department committed fraud by manipulating witnesses, altering a certified vehicle ownership document,

encouraging JF-II to falsely identify defendant, encouraging JF-II to enhance her preliminary examination testimony for trial, and by failing to show the victims other SUVs that were similar to the Margosian SUV. Because defendant did not raise any claim below that the police department conducted a fraudulent investigation, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

The record is devoid of factual support for any of defendant's claims. For many of defendant's claims, he merely asserts theories and asks this Court to deduce that they are legitimate. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Goolsby*, 419 Mich at 655 n 1. Moreover, even if the middle name on the registration of the Margosian SUV was different than defendant's, defendant does not explain how the alleged deception affected the outcome of the trial. Further, the progress of the police investigation was thoroughly explored at trial, including under what circumstances each victim identified defendant, and that a neighbor, who happened to be a police lieutenant, first reported the location of the suspect vehicle. There was no indication that any officer was the cause of a victim's testimony or identification of defendant. In fact, defense counsel questioned the victims at length about their identifications of defendant and any prior inconsistent statements, and, where there was some inconsistency, each victim explained why their testimony might have differed between the preliminary examination and trial.

Moreover, in presenting this claim, defendant confuses the duty to disclose evidence with a duty to find evidence to disprove a victim's claims. See *People v Coy (After Remand)*, 258 Mich App 1, 22; 669 NW2d 831 (2003). In the absence of "a showing of suppression of evidence, intentional misconduct, or bad faith," due process does not require that the prosecution seek and find exculpatory evidence for a defendant's benefit. *Id.* at 21. There is no basis in the record for finding any bad faith or intentional misconduct by the police, or that any evidence was suppressed. Furthermore, there is no requirement that the prosecution negate every theory consistent with a defendant's innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Defendant's right to due process was not violated by the police investigation.

C. IMPROPER ADMISSION OF IDENTIFICATION EVIDENCE

Defendant argues that JF-II's identification from a photographic array should not have been admitted at trial because he was denied his right to a corporeal lineup. Because defendant did not move to suppress the identification evidence or argue that he was entitled to a corporeal lineup below, this issue is unpreserved. Thus, we review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

Defendant correctly asserts that photographic identifications should not be used, subject to certain exceptions, where the accused is in custody. See *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993), and *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Defendant acknowledges that at the time of the photographic identification by JF-II, he had previously been charged for the December 15 assault of AB and had been released on tether for that case. To the extent that defendant could be considered "in custody" at the time of the photographic identification, he was not in custody for the charges relating to the JF-II's case.

Accordingly, there was no plain error. See *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986) (“In this case the defendant, although in custody, was not in custody on the charge to which the photo lineup was related”).

D. SEXUALLY DELINQUENT PERSON CHARGE

Lastly, defendant appears to argue that the prosecution abused its discretion by charging him as a sexually delinquent person. We disagree. Because defendant did not challenge the validity of the charge below, we review this unpreserved claim for plain error affecting substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

“[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.” *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if “a choice is made for reasons that are ‘unconstitutional, illegal, or ultra vires.’” *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Here, the prosecution charged defendant with indecent exposure under MCL 750.335a, which also allows for consideration of whether an individual is sexually delinquent at the time of the indecent exposure. A person charged with indecent exposure may be charged as a sexually delinquent person if his offense has become repetitive or consists of compulsive acts that indicate a disregard of consequences or the recognized rights of others. MCL 750.10a; *People v Murphy*, 203 Mich App 738, 742; 513 NW2d 451 (1994). The prosecution presented evidence of acts committed by defendant against six different women, which supports the conclusion that defendant’s sexual behavior was “characterized by repetitive or compulsive acts which indicate[d] a disregard of consequences or the recognized rights of others[.]” See MCL 750.10a. Therefore, the facts supported the prosecutor’s decision to charge defendant as a sexually delinquent person. Defendant does not offer any information suggesting that the charge was brought for an unconstitutional, illegal, or other improper reason.

Within this issue, defendant also argues that the trial court erred in allowing evidence of acts from the prior trial to be admitted at his sexually delinquent person trial. In the trial court, defendant moved in limine to preclude the acts discussed in the prior trial, and, in a lengthy opinion and order, the trial court denied defendant’s motion, concluding that “the contested evidence is relevant and material to the determination of sexual delinquency” and was admissible in light of *Breidenbach*, 489 Mich at 11-12 (holding that a defendant’s history of sexual misconduct, whether or not such conduct was a charged offense, is admissible at a sexual delinquency trial). In presenting this claim on appeal, defendant does not address the propriety of the trial court’s ruling, or present any pertinent legal authority to support this claim of error. *Goolsby*, 419 Mich at 655 n 1. Further, our review of the trial court’s opinion and order reveals that the trial court acted within its discretion in admitting this evidence, *Feezel*, 486 Mich 192, and, accordingly, we reject this claim of error. See *Breidenbach*, 489 Mich at 11-12.

Finally, defendant asserts that his conviction as a sexually delinquent person violates his Constitutional protections against cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. While defendant does not support this proposition with any legal authority, and this Court therefore is not obligated to address it, *Goolsby*, 419 Mich at 655 n 1, we note that

our Supreme Court has approved a previous panel of this Court's conclusion that a conviction for sexual delinquency punishes a defendant's acts, not status, and does not provide for cruel and unusual punishment. *People v Esper*, 155 Mich App 278, 280-284; 399 NW2d 497 (1986), rev'd on other grounds 429 Mich 859 (reinstating the defendant's conviction as a sexually delinquent person).

Affirmed.

/s/ Mark T. Boonstra

/s/ Pat M. Donofrio

/s/ Jane M. Beckering