

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LAMAR DAVIS,

Defendant-Appellant.

UNPUBLISHED

October 18, 2005

No. 255254

Berrien Circuit Court

LC No. 03-402680 FC

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree murder, MCL 750.317, for the death of Roshanda Bownes. Defendant was sentenced as a habitual offender, MCL 769.12, to 40 to 100 years' imprisonment. We affirm.

I. Corpus Delicti

Defendant first argues the prosecutor failed to establish the criminal agency element of the corpus delicti of homicide and, for this reason, the trial court erred by admitting his confession into evidence. Without the erroneous admission of his confession, defendant further contends, the prosecution failed to present sufficient evidence to convict him of the charged offense and his conviction, therefore, should be reversed.¹ We disagree. This Court reviews the trial court's decision regarding the requirements of the corpus delicti rule for an abuse of discretion. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002).

A. Preservation

Defendant challenged the admissibility of his confessions on the basis of the corpus delicti rule at his preliminary examination and, after he was bound over, in a motion to quash the information. However, it does not appear from the record that defendant objected to the

¹ While defendant framed this issue as a sufficiency of the evidence challenge, in reality defendant's argument attacks the admissibility of his confession under the corpus delicti rule. Therefore, we shall limit our review accordingly.

admission of his confession at trial. Plaintiff contends defendant could only preserve this issue for appeal by objecting to the admission of the confession during trial. We disagree.

Generally, issues not properly raised before a trial court cannot be raised on appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). The purpose behind this preservation requirement is to provide “an incentive for criminal defendants to raise objections at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant’s constitutional and nonconstitutional rights.” *Id.* at 551.

In the present case, the same judge presided over both defendant’s preliminary examination and his trial.² At the preliminary examination, the trial judge heard the relevant testimony and arguments on the issue before deciding that the prosecution had met the burden imposed by the corpus delicti rule. Because the trial court directly ruled on this issue, even if doing so while presiding over the preliminary examination, it was properly presented with the opportunity to correct the error. Therefore, the policy behind the preservation requirement was met. *Grant, supra* at 551. Furthermore, even if the objection raised before the trial judge at the preliminary hearing were not enough to preserve this issue, the trial court directly addressed the merits of defendant’s position during the motion to quash and, consequently, the issue was preserved. See *People v Coy*, 243 Mich App 283, 286-287, 287 n 3; 620 NW2d 888 (2000) (holding that defendant failed to preserve his evidentiary issue by not objecting at trial, in part because the trial court did not directly address the merits of defendant’s position in deciding his motion to quash). Hence, we conclude that, under these circumstances, the issue was properly preserved for appellate review.

B. Establishing Corpus Delicti

Under Michigan’s common law, the prosecution may not introduce the incuplatory statements of the accused without first proving the corpus delicti of the offense charged. *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996); *People v Modelski*, 164 Mich App 337, 341; 416 NW2d 708 (1987). In order to prove the corpus delicti of murder, the prosecution must prove, with evidence that is independent of the accused’s confession, both that a death occurred and that it was caused by some criminal agency. *McMahan, supra* at 549. The corpus delicti must be proved by a preponderance of the evidence, but may be proved by either direct or circumstantial evidence. *Modelski, supra* at 341-342. “Once the corpus delicti of the crime is established, appropriate extrajudicial confessions of the accused are admissible.” *McMahan, supra* at 549.

On appeal, defendant does not dispute the occurrence of a death, but rather argues that the prosecution failed to prove by a preponderance of the evidence that the death occurred as the result of criminal agency.

² Judge Pasula presided over both defendant’s preliminary examination and his trial. Judge Grathwohl presided over defendant’s motion to quash the information.

On the first day of defendant's preliminary hearing, Doctor Stephen Cohle, the forensic pathologist who examined the decedent, testified that he was initially concerned that the decedent had been the victim of a homicide based on the fact that her body had been dumped at the end of a road. For this reason he carefully examined the decedent for signs of homicidal asphyxiation, but found none. Therefore, he initially concluded that the decedent died of accidental cocaine intoxication. Cohle stated that he based this opinion in part on police statements that the decedent's death had been witnessed as a cocaine overdose and that the body was later moved; as well as the presence of a potentially lethal amount of cocaine in the decedent's system. Cohle testified that he changed his conclusion from accidental death by cocaine intoxication to homicidal asphyxia after he learned that defendant had confessed to strangling the decedent. When asked what supported his new conclusion, Cohle testified, "I would say the compelling finding is the history, is the information provided to the police, that this is what happened. I really don't have any anatomic findings to support it."

At the second day of the preliminary hearing, the trial court heard arguments on whether the prosecution presented sufficient evidence to meet the burden imposed by the corpus delicti rule. After arguments, the trial court stated,

– what I think from my listening to the testimony and hearing the arguments, what I think the issue actually is as being posed by the defense is, is the forensic pathologist, the doctor who performed the autopsy, permitted to consider evidence that is extrinsic to the body of the deceased victim in formulating his opinion as to the manner and cause of death. Okay? That's really what the issue is. Can Doctor Cohle use evidence other than the body itself, what the body itself tells him when he's examining it during the autopsy, to determine the manner and the cause of the decedent's death.

Relying in part on *Burns, supra*, the trial court determined that "no law prevents the doctor from considering that evidence, [and] it was proper for him to do so." The trial court then concluded, "Therefore, his [Cohle's] final determination was that death was homicide in nature. That then does, in fact, establish the corpus delicti in this case. Which means that the defendant's confessions then, not just his statements, but his confessions, are admissible at the hearing." Hence, the trial court relied solely on Cohle's opinion when it determined that the burden imposed by the corpus delicti rule had been met.

During the hearing on defendant's motion to quash the information, the trial court again heard arguments concerning whether the corpus delicti had been proved. Specifically, the trial court heard arguments concerning whether the trial court could rely on Cohle's opinion in determining that the corpus delicti had been met where Cohle relied on defendant's confession. After hearing arguments, the trial court stated,

Considering now the issue of the corpus delicti and the admission of Doctor Cohle's findings or conclusions and determining whether he relied solely on the confession or statement of the defendant.

This Court cannot say that it would rule the same as Judge Pasula on this issue because again, this is a close issue. We don't have any prior Michigan case directly on point. But as Doctor Cohle testified that, and it is consistent with a

medical examiner or forensic pathologist[’s] duty to determine cause of death from all of the facts, that he is not prevented from including in his final analysis statements that are provided to him in police reports, which include a statement by the defendant. And his rationale in determining his change of opinion based upon these police reports and there is no doubt about it, the statement of the defendant, that does not give this Court a cause to believe that Judge Pasula’s ruling was an abuse of discretion.

Thus, the trial court determined that the court at the preliminary hearing could rely on the medical examiner’s testimony to establish the corpus delicti, even where the medical examiner’s opinion was based solely on defendant’s confession.

We agree that the opinion of the forensic pathologist who examined the decedent will often be sufficient to establish both that a death occurred and that it was the result of criminal agency,³ however, under the facts presented, we conclude the trial court abused its discretion when it determined that plaintiff had met the burden imposed by the corpus delicti rule based solely on the opinion of plaintiff’s forensic pathologist.

Whether it is reasonable for a forensic pathologist to consider the totality of the evidence presented to him or her, including evidence extrinsic to the corpse itself, does not alter the burden imposed by the corpus delicti rule on the prosecution. The prosecution must still establish, by a preponderance of the direct or circumstantial evidence, “that the victim is dead and that death was the result of some criminal agency.” *Modelski, supra* at 342. Furthermore, “such proof *must* consist of evidence that is *independent* of the accused’s confessions.” *McMahan, supra* at 549, citing *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995) (emphasis added). Hence, even if the forensic pathologist may reasonably base his or her conclusions on a defendant’s confession, the trial court may not rely on the forensic pathologist’s opinion to the extent that it is based on the defendant’s confession. In the present case, Cohle clearly stated that he changed his opinion on the decedent’s cause of death to homicidal asphyxia based solely on defendant’s confession that he strangled the decedent. Therefore, the trial court could not properly rely on this opinion alone to establish the criminal agency prong of the corpus delicti rule.

Furthermore, we do not believe that *Burns, supra* contradicts this holding. In *Burns*, the death of an eleven-month-old child by asphyxiation was initially ruled an accident. *Id.* at 437. However, more than ten years after the child’s death, the police reopened the case after receiving information from the defendant’s niece, who alleged that the defendant confessed to lying to the police about the facts surrounding the decedent’s death. *Id.* During the defendant’s trial, his inculpatory statements were admitted against him and he was convicted of voluntary manslaughter. *Id.* at 438. On appeal, the defendant argued that the medical examiner’s conclusion that the child died of homicide was unsupported by objective medical evidence and, therefore, the trial court improperly admitted his inculpatory statements contrary to the corpus delicti rule. *Id.* at 438-439. This Court disagreed, “the medical examiner’s testimony was that

³ See *McMahan, supra* at 551 n 13.

(1) given the size limitations of the throat, (2) the normal response of the gag reflex, (3) the size, shape, and dimensions of the object that was lodged in the child's throat, and (4) the extent of bruising in her throat, the object was forced into the child's throat. The testimony sufficiently established that the child's death was caused by a criminal agency" *Id.* at 439. Thus, this Court determined that the corpus delicti of the crime was properly established by the medical examiner's testimony concerning facts other than the defendant's inculpatory statements. Consequently, this case does not stand for the proposition that the trial court may properly rely on a medical examiner's opinion where he or she relies solely on the defendant's inculpatory statements.

Although the trial court abused its discretion when it determined that plaintiff had met its corpus delicti burden based solely on Cohle's opinion that the decedent died from homicidal asphyxia, such error will not warrant a reversal if it was harmless. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Under the harmless error test, "preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id.* at 495-496, quoting MCL 769.26. Thus, if plaintiff met the burden imposed by the corpus delicti rule, albeit for reasons different than stated by the trial court, the trial court's erroneous reliance on the forensic pathologists opinion would constitute harmless error.

When examining whether the burden imposed by the corpus delicti has been met, it must be remembered that the rule applies only to confessions of guilt. Where the defendant makes admissions of fact, which do not amount to confessions of guilt, those admissions may be admitted to prove the corpus delicti of the crime. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991), citing *People v Porter*, 269 Mich 284, 289-291; 257 NW 705 (1934). Likewise, the actions of the defendant both before and after the death of the decedent may be used to circumstantially establish the criminal agency prong of the corpus delicti rule. *Modelski, supra* at 345-346 (noting that defendant's actions after the victim's disappearance tended to support a finding that the missing woman died as a result of some criminal agency perpetrated by the defendant).

In the present case, trial testimony established that the decedent's body was found at the end of a deserted turn-around near a warehouse. One witness indicated the area did not contain a body when the witness checked the area just two days before. Preliminary examination testimony also established that the decedent was found with her jean jacket three-quarters over her head.⁴ Furthermore, in his first statement to the police, defendant made several admissions, which did not amount to a confession, that support the conclusion that the decedent's death was caused by criminal agency.⁵ Defendant admitted that he met the decedent on the Friday before

⁴ At the trial, plaintiff did not elicit this same testimony. Instead, the witness said he could not see the decedent's face when he discovered her body. Thereafter, he identified a picture of the corpse taken at the scene. Presumably, this picture showed the covered state of the decedent when she was discovered, including her covered head.

⁵ We reject defendant's contention that the admissions of fact within his initial statement to the police amounted to a confession. "If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt but needs
(continued...)

she was found and took her to his father's house, where they used cocaine and had sexual relations. He also admitted that he was present when she died, although he denied being the cause of her death. He also admitted to leaving her corpse on a bed throughout Saturday and, after borrowing his sister's van, to dumping the decedent's corpse at the end of the turn-around on Sunday. He also admitted to disposing of the decedent's personal belongings, the sheets used to wrap her body, a piece of the mattress upon which she had leaked some bodily fluid, and to cleaning his sister's van, both inside and out. This evidence was sufficient to support, by a preponderance of the evidence, the conclusion that the decedent's death was caused by some criminal agency. *Modelski, supra* 345-346. Therefore, the requirements of the corpus delicti rule were met and defendant's confession was properly admitted into evidence. Consequently, the trial court's reliance on Cohle's testimony was not outcome determinative and does not warrant a new trial. *Lukity, supra* at 495-496.

II. Other Acts Evidence

Defendant next argues the trial court erred when it admitted prejudicial other acts testimony against him contrary to MRE 404(b). Defendant contends that the erroneous admission of this evidence warrants a new trial. We disagree. This Court reviews the trial court's rulings on the admission of evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524.

A. MRE 404(b)

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 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.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court adopted the approach to other acts evidence enunciated by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

(...continued)

proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession but an admission . . .” *Porter, supra* at 290. Defendant's first statement to the police was not a confession, but rather admitted subordinate facts and guilty conduct, which did not by themselves constitute an admission of guilt. *Id.*

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.” *VanderVliet, supra* at 75, quoting advisory committee notes to FRE 404(b). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*Id.* at 55-56.]

The prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact other than character or propensity to commit a crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). “Where the only relevance of the proposed evidence is to show the defendant’s character or the defendant’s propensity to commit the crime, the evidence must be excluded.” *Id.* at 510.

B. Testimony of Nikki Jackson

Before defendant’s preliminary examination, plaintiff gave notice that he intended to present three witnesses who would testify about other acts committed by defendant. One of these witnesses was Nikki Jackson. According to Jackson, defendant kidnapped, physically assaulted, and raped her. Jackson also stated that defendant said he was going to kill her and, when she began to yell, placed one hand over her mouth and the other over her throat and choked her until she defecated and nearly passed out. Jackson said defendant only spared her life because he realized she was not the person he had thought she was.

At the preliminary examination, defendant’s trial counsel objected to all three witnesses on the basis that their testimony was not relevant to prove a fact other than bad character or a propensity towards violence. He also objected to Jackson’s testimony on the ground that it was particularly graphic and, therefore, too prejudicial. At the preliminary hearing, the trial court ruled that the other acts testimony was admissible to prove motive and intent, but left open the possibility that defendant’s trial counsel might bring a motion to address the prejudicial nature of the details involved in Jackson’s testimony. At a hearing held on January 12, 2004, the trial court heard additional arguments concerning Jackson’s testimony. The court concluded that the testimony was admissible to show intent but that certain aspects of Jackson’s testimony were prejudicial. However, rather than prohibit her testimony altogether, the trial court limited plaintiff to eliciting testimony that, “during a struggle, the Defendant placed one hand over her mouth and one hand around her neck choking her until she defecated upon herself and nearly passed out.” Further, the court ordered that Jackson was specifically precluded from testifying that defendant kidnapped, raped or threatened to kill her.

As already noted, in order for other acts testimony to be admissible, it must be offered to prove something other than character or criminal propensity and must be relevant to an issue of fact of consequence at trial. *Sabin, supra* at 55. Plaintiff’s stated purpose for eliciting Jackson’s testimony was to establish defendant’s motive and intent, which are permissible purposes under MRE 404(b)(1). The elements of second-degree murder are: (1) death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457

Mich 442, 463-464; 579 NW2d 868 (1998). “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464, citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). Hence, to convict defendant of second-degree murder, plaintiff had to prove that defendant had the requisite malice when he choked the decedent. Jackson’s testimony tended to show that defendant either intended to cause Bownes’ death when he choked her or that he was aware that the natural tendency of this act was to cause death or great bodily injury.⁶ Therefore, this testimony was relevant to prove the malice element of second-degree murder. See MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998) (addressing the nature of relevant evidence). Consequently, it was offered for a permissible purpose under MRE 404(b)(1).

However, even if testimony concerning other acts is relevant to prove a fact other than character or criminal propensity, it may still be inadmissible if its probative value is substantially outweighed by the danger of undue prejudice. MRE 403; *Knox, supra* at 509. Undue prejudice does not necessarily equate to damaging; any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). In this case, the trial court weighed the probative value of the evidence against the potential for undue prejudice and properly limited the scope of the testimony to those portions most probative of defendant’s intent and the least prejudicial in nature.⁷ Considering the facts on which the trial court made its decision and the actions it took to mitigate prejudice, we cannot conclude the trial court abused its discretion in admitting Jackson’s testimony.

III. Expert Testimony

Defendant next contends the trial court erred when it permitted the introduction of expert testimony contrary to MRE 702 and MRE 703. Specifically, defendant contends that the medical examiner’s opinion, which was based solely on defendant’s confession, was improperly admitted

⁶ We disagree with defendant’s contention that the incident with Jackson was too dissimilar to be relevant to show intent. First, the authorities defendant cites all refer to the level of similarity necessary to admit the testimony to prove scheme, plan, or system under 404(b)(1) and not to prove intent. See *Sabin, supra* at 61-68. Second, during the Jackson incident, defendant allegedly choked Jackson after she began to yell and in the same manner that he choked the decedent. Consequently, the facts were sufficiently similar to warrant admission to show defendant’s intent when he grasped the decedent and began choking her.

⁷ We also reject defendant’s argument that the trial court erred by limiting the scope of Jackson’s testimony to exclude all the violent details. During the hearing of January 12, 2004, defendant’s trial counsel argued that this testimony was inadmissible because, in part, the jury would learn that defendant solicited prostitutes and was a kidnapper and rapist. Based on this argument, the trial court excluded those prejudicial elements from Jackson’s testimony. Defendant cannot now claim error based on the very position he advocated before the trial court. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

without ensuring that the conclusions were based on admitted evidence and reliable data and methodology. This error, defendant concludes, warrants reversal of his conviction. We find defendant's argument to be without merit. Because defendant failed to object to the admission of Cohle's reports and testimony on this basis before the trial court, we shall review the admission of this evidence for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

MRE 702 provides,

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In addition, MRE 703 provides that an expert's opinion must be based on facts in evidence. Defendant does not contend that Cohle was not an expert in his field or that the trier of fact would not benefit from his testimony regarding his findings from the autopsy of the decedent, but rather argues that Cohle's use of defendant's confession in determining the decedent's cause of death in his second autopsy report should have been excluded as unreliable under MRE 702. Defendant further argues that, because his confession was not properly admitted, it could not serve as the basis of an opinion under MRE 703. As already noted, defendant's confession was properly admitted into evidence. Therefore, defendant's argument that Cohle could not base his opinion on defendant's confession under MRE 703 is without merit. Furthermore, at trial, defendant stipulated to the admission of Cohle as an expert forensic pathologist and Cohle testified that it was normal practice within his profession to use all available information in the determination of a decedent's cause and manner of death. Defendant did not and has not presented any evidence to contradict this testimony. Therefore, defendant has failed to demonstrate that the admission of Cohle's testimony and reports amounted to plain error affecting his substantial rights.

IV. Ineffective Assistance of Counsel

Defendant next argues that his trial counsel was ineffective. We disagree. Because defendant failed to create a testimonial record before the trial court with regard to his claims of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462

Mich 281, 302; 613 NW2d 694 (2000). That is, defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). However, the effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this burden, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under the circumstances and according to prevailing professional norms and then must show that there is a reasonable probability that but for counsel's errors, the trial outcome would have been different. *Id.* at 663-664 (citations omitted).

Defendant claims his trial counsel was ineffective because he failed to request a jury instruction on the defense of accident and on the elements of involuntary manslaughter or otherwise object to the trial court's failure to sua sponte give such instructions. However, defendant's trial counsel argued throughout the trial that defendant did not cause Bownes' death at all, but rather that she died from an accidental overdose of cocaine. While defendant's trial counsel could have presented a defense that was inconsistent with this theory of the case, 2.111(A)(2); *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), defendant has presented no evidence that his trial counsel's decision not to do so was anything other than sound trial strategy. Furthermore, although involuntary manslaughter is a necessarily included lesser offense of second-degree murder, *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003), defendant's trial counsel may have elected not to request an instruction on this offense because he believed plaintiff had failed to meet its burden with regard to the intent elements for second-degree murder and voluntary manslaughter and,⁸ as a result, concluded that his client stood a better chance of obtaining a complete acquittal absent such an instruction. 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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Therefore, on the limited record before us,⁹ we cannot conclude defendant's trial counsel's failure to request an instruction on the defense of accident or on involuntary manslaughter constituted performance that fell below an objective standard of reasonableness under prevailing professional norms. Consequently, defendant's trial counsel was not ineffective.

V. Sentencing Issues

Finally, defendant argues that, because of several sentencing errors, this Court must vacate his sentence and remand for resentencing. We disagree. Defendant contends that the trial court should have scored OV 13 at zero points. Because the trial court did in fact score OV 13 at zero points, there is no error to review.¹⁰ Defendant also argues that OV 10 was improperly

⁸ Murder and voluntary manslaughter have the same intent. See *Mendoza*, *supra* at 540.

⁹ We note that the discussions concerning the jury instructions were not made on the record and, therefore, were not available for our review.

¹⁰ Defendant also argues that the trial court erred by scoring OV 13 based on findings not found by a jury contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Because the trial court did not score this variable, we decline to address defendant's

(continued...)

scored at 5 points. However, we note that, even if we were inclined to agree with defendant's contention that OV 10 should have been scored at zero points, it would not have altered the recommended range. See MCL 777.61. When the correct score "would not change the guidelines recommended range, remand for sentencing is not required." *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004). Therefore, even if OV 10 were improperly scored, defendant would not be entitled to resentencing.

VI. Conclusion

While the trial court improperly relied solely on the opinion of plaintiff's expert forensic pathologist to establish the corpus delicti of murder, there was sufficient evidence independent of the pathologist's opinion to establish corpus delicti. Therefore, defendant's confession was admissible and the trial court's error was harmless. Likewise, the trial court did not abuse its discretion when it permitted Jackson to testify concerning other acts committed by defendant for the limited purpose of showing defendant's intent and did not err by permitting plaintiff's expert forensic pathologist to testify concerning the cause and manner of the decedent's death. Finally, defendant has failed to overcome the presumption that his trial counsel's decision not to request jury instructions on the defense of accident and for involuntary manslaughter were anything other than trial strategy and failed to demonstrate that he is entitled to a remand for resentencing because of errors in his original sentence. Therefore, there were no errors warranting the requested relief.

Affirmed.

/s/ Michael R. Smolenski

/s/ Alton T. Davis

I concur in result only.

/s/ William B. Murphy

(...continued)

Blakely argument.