

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GABRIEL FERRIS,

Defendant-Appellant.

UNPUBLISHED
February 28, 2006

No. 256439
Saginaw Circuit Court
LC No. 95-010303-FC

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree felony murder. MCL 750.316.¹ The trial court sentenced defendant to life in prison without the possibility of parole. We affirm.

I. Facts and Procedural History

On the morning of June 15, 1974, the twenty-one-year-old victim was found strangled in an upstairs bedroom of the house where she resided. She was found lying on the floor almost completely naked. In addition, she had bruises on her face and abrasions that were consistent with struggling while pinned to the floor. From these facts, the medical examiner concluded that the victim had been strangled to death and that her positioning indicated that she had been raped.

While there was some physical evidence, including hairs, fibers, fingerprints, and a substance found inside the victim, the physical evidence was insufficient to identify a likely perpetrator. The police did, however, identify several suspects, including defendant, but because of the inconclusive nature of the physical evidence, no suspect was brought to trial for more than twenty years.²

¹ On the first day of the trial, plaintiff informed the court that it was dropping the separate rape charge. Instead, the parties agreed that the sole charge would be felony murder with the predicate felony being rape or attempted rape. On June 8, 2004, plaintiff filed an amended information with the trial court, which reflected the change.

² In 1974 the police did file an arrest warrant for Abass Esfahani, an Iranian exchange student
(continued...)

In 1994, a previously unidentified fingerprint was identified by the police, which triggered a reexamination of the evidence relating to the victim's murder. As a result of this reexamination and some interviews with old and new witnesses, defendant was arrested and charged with the victim's murder in 1995. In January of 1996, a jury found defendant guilty of felony murder. Defendant then appealed to this Court alleging that, as a result of numerous errors, he was deprived of a fair trial. This Court agreed that defendant had been deprived of a fair trial as a result of several errors, including the admission of other acts evidence in violation of MRE 404(b). Consequently, this Court reversed defendant's conviction and remanded the case for a new trial.³

Defendant was retried in February of 2004. However, the trial court was compelled to declare a mistrial after the jury was unable to reach a verdict. In May of 2004, defendant was again tried before a jury. On May 27, 2004, the jury found defendant guilty of felony murder. On June 10, 2004, the trial court sentenced defendant to life in prison without the possibility of parole. Defendant then appealed to this Court as of right.

II. Great Weight of the Evidence

Defendant first argues that he is entitled to a new trial because the verdict was against the great weight of the evidence. We disagree.

This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).⁴ “[A]n abuse of discretion can be found only where ‘an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made.’” *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2004), quoting *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). Further, a trial court may only grant a new trial on the ground that the verdict was against the great weight of the evidence “if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

At trial, several witnesses testified concerning statements made by defendant, which implicated him in the murder. Leroy Hoefling testified that he resided with defendant during the winter of 1974 to 1975 and that on two occasions he had overheard defendant phone the Saginaw

(...continued)

who dated the victim. However, testimony at trial established that the reason for the warrant was in part an unsuccessful attempt to stop him from leaving the country. Further testimony established that the police eventually eliminated Esfahani as a suspect.

³ *People v Ferris*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1999 (Docket No. 193744), lv den 462 Mich 883 (2000).

⁴ Defendant filed a motion before the trial court requesting a new trial based in part on the argument that the verdict was against the great weight of the evidence. The trial court issued a final order denying the motion on April 28, 2005. Therefore, this issue was properly preserved. See MCR 2.611(A)(1)(e); *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

police concerning the victim's murder.⁵ After the first call, Hoefling stated defendant told him that he wanted to see how close the police were getting to him. After the second call, Hoefling stated that he asked defendant why he was calling the police and defendant became teary eyed and seemed as though he wanted to tell him something. Hoefling further stated that defendant told him that he had come back from his honeymoon to make up with the victim and was making love to the victim and did not mean to do it.

Three other witnesses, Linda Fairbanks, Patricia Skeba and Thomas Skeba testified concerning a car trip where the defendant allegedly made self-incriminating statements. Fairbanks testified that she was sixteen at the time of the car trip and living with defendant. She stated that, on the car trip in question, she became quite scared of defendant after he told Thomas, "I didn't mean to do it," over and over. Patricia stated that defendant described his relationship with the victim and then said "the killer didn't mean it."⁶ She then stated,

He said that she had been raped before, and that she knew not to fight because it would hurt her. So she just laid there and accepted the fact that she was being raped. The killer, and – and said that when the killer was coming, there was no excitement in it, what do you call it, intercourse, I guess. He wanted more or so he said. He started choking and choking and made her struggle to have some – I don't know, movement, I guess, or something. Before the killer knew it, she was dead.⁷

She further stated that, while describing these events, defendant became tense and breathed very hard. She also said he grabbed the headrest in front of him and squeezed it so hard his fingertips touched. She stated that defendant said the killer didn't mean to do it approximately 15-20 times. Thomas also described this same car trip, but testified that defendant never said "he did it." However, Thomas did state that defendant described how he thought the killer committed the murder and that defendant got a bit worked up during the conversation. Thomas also testified that Fairbanks' said "did you hear what he [defendant] said?" and became quite upset.⁸

⁵ Because Hoefling had since passed away, his testimony from the 1996 trial was read into evidence at defendant's May 2004 trial.

⁶ Before voir dire commenced, the parties agreed to stipulate to the admission of Patricia Skeba's testimony for the prosecution and to Thomas Skeba's testimony for the defense from defendant's second trial. At that trial, Patricia stated that she had no independent recollection of a recorded statement she made to the police in 1976. As a result, the court permitted Patricia to read her 1976 statement into the record.

⁷ This statement was consistent with defendant's sworn statement to the police, which was taken on November 19, 1976 and read into evidence at trial. In 1976, defendant told police that the victim had been raped in the past and that, "She just let it happen. From experience, that was the best way for her to be. That's why, you know, we talked about the situation come – came down on her getting killed without having a lot of bruises . . ."

⁸ During his 1976 interview with the police, defendant stated, "[i]f it was me, I, myself, was in a situation like that, you know, I look at it like somebody else – somebody did it and probably didn't know what – didn't know that they even killed her."

Finally, Jeffrey McKenna testified that he was in the holding cell at court with defendant when defendant confessed to murdering the victim. McKenna stated that defendant told him that he had been fooling around with this other lady and that she said she was going to tell defendant's wife. McKenna said defendant told him that he went away on his honeymoon, "but not too far away so that he could come back and do what he had to do." He further testified that defendant described putting cough syrup in his wife's drink to get her to sleep while he returned to the other woman's house and strangled her.

In addition to this testimony, the prosecution presented evidence that defendant's fingerprints were found on the dresser next to the victim's head. While there was testimony that defendant had been in the house on several occasions before, the peculiar location of the fingerprints near the bottom of the dresser and the fact that they were in an upward position strongly suggested that at some point in time defendant was prone in the exact location where the killer would have had to have been while strangling the victim.

In his defense, defendant presented the theory that someone else committed the murder while he was away on his honeymoon. In support of this theory, defendant noted that someone else's hair was found on and around the victim and that a fluid found inside the victim suggested that the victim was murdered by a sterile man. In addition, defendant argued that the evidence indicated that he was approximately an hours drive from the scene of the crime when the victim was murdered.

Testimony established that five hairs that were similar to hair from Tony Alvarez, a cousin of the victim's roommate, Maxine Braley, were found on or near the victim. A head hair was found near the victim's shoulder, three eyebrow hairs were found on the victim's chest and one pubic hair was found on the victim's pubic region. While the presence of these hairs might suggest that Alvarez may have been the killer, Richard Bisbing, plaintiff's trace evidence and serology expert, testified that the hairs were likely the product of secondary transfer. Bisbing testified that secondary transfer occurs when a hair is shed onto surface and is picked up and transferred by subsequent contact. Bisbing stated that the victim may have picked up the hairs from the rug as she struggled on the floor. This theory is consistent with testimony that established that Alvarez stayed at the home for a time and had access to the bedroom where the victim was found and with Bisbing's testimony that the hairs appeared to be shed hairs. Bisbing further noted that, in addition to the eyebrow hairs, two animal hairs were also found on the victim's chest and a pubic hair similar to Braley's hair was found on the victim's pubic region. Bisbing opined that the presence of the animal hairs and Braley's hair increased the likelihood that all the hairs originated through secondary transfer.

Dr. Ronald Hines, M.D., the pathologist who first examined the victim, testified that he found a thick and creamy exudate around the victim's cervix, which at the time he thought might be an ejaculate.⁹ Because the exudate did not contain semen, police originally believed they might be searching for a sterile killer. Testimony established that defendant is not sterile and

⁹ Hines passed away after defendant's first trial. At defendant's May 2004 trial, Hines' testimony from the first trial as well as a later statement made in 1998 were read into evidence.

was likely not sterile at the time of the murder. However, in a later statement, the original examiner noted that semen would not normally be thick and creamy more than one hour from the moment of ejaculation.¹⁰ Further, Dr. Kanu Virani, an expert in forensic pathology, testified that the vaginal samples taken from the body did not have the protein found in semen, but did contain vaginal epithelial cells. From this, he concluded, the exudate was not semen, but rather was likely normal vaginal excretions that pooled at a low point on the body.

Finally, while defendant did state in his 1976 statement to the police that at the time of the murder he was on his honeymoon in Tawas, which was more than an hour drive from the scene of the crime, the testimony of defendant's ex-wife, Terry Igaz, established that defendant had the opportunity to commit the murder. Igaz testified that on the evening of the murder, defendant stated that he wanted to return to Saginaw to see a hospitalized friend without her.¹¹ She also stated that, after they both went to bed, she awoke to find defendant fully dressed. When asked, defendant told her that he had some business to take care of, but after she told him she did not want him to go, he undressed and got back into bed. Finally, she testified that at dawn she heard the sound of a car door slamming, the house door slamming, and the sound of defendant coming up the stairs. She also stated that she saw blood on defendant's clothing, which defendant explained came from a rabbit that he hit while driving around the point.

While the evidence cited by defendant might suggest to some persons that someone other than defendant strangled the victim, it cannot be said to preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *Lemmon, supra* at 627. Rather the evidence in this case is such that different minds might naturally and fairly come to different conclusions and, therefore, "the judge may not disturb the jury findings although his judgment might incline him the other way." *Id.* at 644. Consequently, the trial court did not abuse its discretion in refusing to grant defendant a new trial on the ground that the evidence was against the great weight of the evidence.

III. Other Acts Testimony

Defendant next contends that the trial court abused its discretion when it permitted the prosecution to present testimony from Igaz concerning other acts committed by defendant. Defendant argues that the other acts testimony was barred pursuant to the law of the case doctrine and, even if it were not, the other acts testimony was still inadmissible under MRE 404(b). Because the erroneous admission of the other acts testimony deprived him of a fair trial, defendant asserts he is entitled to a new trial. We disagree with each contention.

¹⁰ This is consistent with defendant's own expert's testimony that semen would normally liquefy with time.

¹¹ In his statement to the police, defendant acknowledged that during the evening of the night of the murder he wanted to leave Tawas and return to Saginaw. At first he stated that it was probably to get "some more pot to smoke", but later stated that it was to see a friend who was hospitalized.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). However, whether a rule or statute precludes admission of evidence is a matter of law and reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[W]hen such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.* Where evidence is erroneously admitted after a proper objection, it 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.

A. The Law of the Case Doctrine

In his first appeal to this Court, defendant argued, among other things, that he was deprived of a fair trial by the admission of other acts evidence in contravention of MRE 404(b). Specifically, defendant argued that the testimony by Igaz that he assaulted her, grabbed her around the throat, choked her and either raped her or attempted to rape her was not admitted for a relevant purpose and was prejudicial. This Court agreed with defendant and, in a two-to-one opinion, reversed defendant's conviction in part based on the erroneous admission of prejudicial other acts testimony.

In a motion in limine dated August 23, 2000, plaintiff moved the trial court to again permit the admission of Igaz's testimony concerning these other acts at defendant's new trial. In a hearing held on September 18, 2000, the trial court heard arguments on this motion. At the hearing, the trial court noted that, under the law of the case doctrine, it was bound to exclude the evidence unless it determined that subsequent Supreme Court decisions changed the law. Plaintiff responded by arguing that, under *People v Phillips (After Second Remand)*, 227 Mich App 28; 575 NW2d 784 (1997), a trial court is not bound by the law of the case doctrine where it determines that this Court's decision was clearly erroneous. The trial court recognized that there was considerable confusion about the application of MRE 404(b) even among the appellate courts and determined that it would take the matter under advisement, review the development of the law subsequent to the 1999 decision of this Court reversing defendant's conviction, and determine whether the law had changed. In an opinion and order dated August 20, 2003, the trial court determined that it was not bound by the law of the case doctrine. It explained,

This Court finds that the two Judges that found this Court in error in allowing the testimony of Terry Igaz [defendant's ex-wife] pursuant to MRE 404(b) to be clearly erroneous in view of the subsequent decisions of the Michigan Supreme Court in *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888] (2000); *People v Hine*, 467 Mich 242, 244; 650 NW2d 659] (2002); *People v Katt*, 248 Mich App 282, 303-305; 639 NW2d 815] (2001). To continue to follow such an erroneous decision would create injustice. *People v Phillips, supra.*

For this reason, the trial court permitted the admission of this testimony at defendant's new trial.

In *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), our Supreme Court described the nature of the law of the case doctrine.

Under the law of the case doctrine, “if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court’s decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court’s determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300. [*Id.* at 259-260.]

The purpose of the law of the case doctrine is to “maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” *Locricchio v Evening News Ass’n*, 438 Mich 84, 109; 476 NW2d 112 (1991), quoting Wright, Miller & Cooper, Federal Practice & Procedure, § 4478, p 788.

The law of the case doctrine normally applies regardless of the correctness of the prior determination, *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997), because an appellate court lacks jurisdiction to modify its own judgments except on rehearing, *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). Indeed, where “a litigant claims error in the first pronouncement, the right of redress rests in a higher tribunal.” *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). However, where there has been an applicable intervening change in the law, see *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994), where the facts have materially changed, see *Lopatin, supra* at 259-260, or where the doctrine must yield to a competing doctrine, see *Locricchio, supra* at 109-110 (stating that, under libel law, the doctrine must yield to the requirement of independent review of constitutional facts), the law of the case will not prevent this Court from revisiting an issue already decided. In addition, in a criminal case this Court has the power to grant the defendant a new trial at any time where justice has not been done. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

In this case’s prior appeal, a majority of this Court determined that the other acts testimony of defendant’s ex-wife was not admissible for a proper purpose under MRE 404(b) and,¹² even if it were admissible for a proper purpose, the danger that the jury would improperly use the other acts testimony substantially outweighed its probative value under MRE 403. It is clear that the relevant facts have not changed, there are no superior competing constitutional

¹² The majority from defendant’s first appeal only directly addressed plaintiff’s arguments that the other acts evidence was admissible under a *modus operandi* theory to prove identity and to prove motive. However, it noted that before the trial court plaintiff had argued that the evidence was also properly admissible to prove the existence of a plan or scheme. See *People v Ferris*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1999, slip op n 4 (Docket No. 193744).

doctrines, and this Court is not being asked to disregard the law of the case in order to grant defendant a new trial. Hence, the only issue is whether the trial court correctly determined that there was an intervening change in the law that removed this issue from the application of the law of the case doctrine.¹³

In *Sabin* our Supreme Court clarified when evidence is admissible under MRE 404(b) to show a defendant's plan, scheme, or system in doing an act. The Court first affirmed its adherence to the approach to other acts evidence stated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). *Sabin, supra* at 55-59. It then clarified that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 63. Under this theory, "the jury is asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred." *Id.* at 63-64 n 10. The Court further explained that the degree of similarity required for this evidence is less than that needed to prove identity. *Id.* at 65; see also *Hine, supra* at 251-252. Finally, the Court explicitly rejected the notion that logical relevance is limited "to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Sabin, supra* at 64.

In this Court's previous opinion, the majority analyzed the admissibility of defendant's ex-wife's other acts testimony under the test stated in *VanderVliet, supra*, but did not have the benefit of the clarifications provided by *Sabin*. We agree with the trial court that *Sabin* represented a significant intervening development of the law applicable to MRE 404(b), which removed this issue from the application of the law of the case doctrine. Therefore, the trial court could properly reconsider the admissibility of the other acts evidence.

B. MRE 404(b)

Having determined that the law of the case doctrine did not bar the trial court from reconsidering the admissibility of the other acts testimony by defendant's ex-wife, we shall next address defendant's argument that the other acts evidence was still not properly admissible under 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

¹³ We reject the notion that the trial court could properly disregard this Court's previous ruling on the basis that the ruling was erroneous. Trial court's are without the authority to overrule this Court. See *Lopatin, supra* at 259-260; *Driver, supra* at 565 (noting that a ruling of the Court of Appeals binds all lower tribunals with respect to that issue without regard to the correctness of the ruling).

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 *VanderVliet, supra*, 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). *Sabin, supra* at 55.

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.” *Knox, supra* at 510.

In its brief in support of its motion in limine requesting the admission of testimony by Igaz concerning other acts committed by defendant, the prosecution argued that the other acts testimony helped establish defendant’s intent, identity, and established a pattern or method to how defendant sexually assaulted women with whom he had a relationship. After determining that the law of the case doctrine did not apply, the trial court permitted Igaz to testify concerning the other acts, but limited the use of this testimony to prove that defendant “used a plan, system, or characteristic scheme” Further, the trial court instructed the jury that this was the only permissible use for that testimony and admonished them not to “convict the defendant here because you think he is guilty of other bad conduct.”

On direct examination, Igaz testified about physical abuse she suffered at the hands of defendant. She explained that, “sometimes, he would grab me by the neck, and it didn’t matter which way if he grabbed me by the side or the front and throw me around, and sometimes he would choke me, he’d pinch, twist – pinch, twist and pull the skin on my neck” When asked what would prompt defendant to do such things, Igaz stated that defendant would attack her in this way when he wanted “me to do things that I didn’t want to do or he – he wanted me to

obey him.”¹⁴ She further testified that defendant would sometimes use this technique to get her to do things of a sexual nature.

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.” *Hine, supra* at 251. In this case, Igaz’s testimony concerning defendant’s other acts is sufficiently similar to the evidence concerning the circumstances surrounding the victim’s death that the jury might properly “infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred.” *Id.* at 63-64 n 10.

In his 1976 statement to the police, defendant stated that he had intended to have a date with the victim on the night before his marriage. He described this night as his “stag” night, but explained that he was unable to go because his wife-to-be got him “all locked up in some crap.” Defendant also told the police that on the same night that they were supposed to have the date, the victim learned about his marriage and became very upset. The jury also learned from Igaz that, on the day she and defendant arrived in Tawas for their honeymoon, defendant wanted to return to Saginaw without her. Igaz also testified that defendant made several telephone calls from the home in Tawas, allegedly to his hospitalized friend, but hung up whenever he realized that Igaz saw him. From this evidence and other evidence presented, the jury could infer that defendant was determined to have his “stag” night with the victim and that he contacted her for that purpose, but that she was not cooperative. They could also infer that defendant did in fact leave Tawas on the night of the murder and met up with the victim at her home. Additionally, from the evidence concerning the victim’s injuries, the jury could conclude that the victim refused to participate in the requested sexual activities after defendant arrived and, as a result, defendant utilized his common plan, scheme, or system of grabbing, hitting, throwing, and choking the victim in order to get the victim to comply with his sexual requests. Hence, the other acts evidence was relevant to show that the underlying felony of rape or attempted rape occurred, i.e. for a purpose other than to prove that the defendant had bad character and acted in conformity with that character on a particular occasion. *Sabin, supra* at 56.¹⁵ Furthermore, while the other acts evidence had the potential for prejudice, whether the probative value was substantially outweighed by the potential prejudice is a close question. Because a trial court’s decision on a close evidentiary question ordinarily cannot be an abuse of discretion, see *Hine, supra* at 250, we cannot conclude that the trial court abused its discretion by permitting the other acts testimony in question. Consequently, the trial court did not err when it permitted Igaz to testify about the other acts in question.

¹⁴ This testimony is consistent with defendant’s 1976 statement to the police. In this statement defendant admitted that he slapped his ex-wife “when she got too outrageous.” He further admitted that he choked her, but explained, “Yeah, but I just choked her to stop her, man, and she wouldn’t have nothing but to listen to me.”

¹⁵ Once defendant pleaded not guilty, the prosecution had the burden of proving each of the elements of the charge at issue. *Sabin, supra* at 60. Hence, the prosecutor could present other acts evidence in order to prove that the underlying felony of rape or attempted rape occurred.

IV. Hearsay Evidence

Defendant next argues that the trial court deprived him of the right to present a defense when it refused to let defendant admit police reports, forensic reports and other documents that indicated that the police originally believed that the perpetrator of the murder might be a dark-skinned sterile man and that the police originally believed that the person who left hairs on the victim's body must be the killer. We disagree. As already noted, a trial court's evidentiary decisions are reviewed for an abuse of discretion. *Manser, supra* at 31.

This issue was not properly preserved for appellate review. While defendant did file a motion in limine on January 6, 2004, requesting the admission of certain police reports under the hearsay exception stated in MRE 803(8), defendant now argues that the trial court erred when it denied the motion because the reports were properly admissible under MRE 803(16) and (24). The motion to admit evidence on one ground is insufficient to preserve an appellate attack based on a different ground. See, e.g., *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Consequently, we shall review this unpreserved nonconstitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order to demonstrate that a plain error affected his substantial rights, defendant must show prejudice, i.e. that the error affected the outcome of the lower court proceedings. *Id.* at 763.

At trial, defendant's trial counsel was permitted to explore the development of the investigation into the victim's murder over the past three decades. Defendant's trial counsel elicited testimony that the police originally believed that the perpetrator was likely the person who left the hairs on the victim's body and that those hairs likely came from a dark-skinned man. In addition, testimony at trial established that five of the hairs found on the victim were similar to hairs taken from Alvarez. Defendant's trial counsel also elicited testimony that the police originally believed the killer was sterile and presented testimony that defendant was not sterile. Finally, in his closing, defendant's trial counsel argued that the real killer was Alvarez and suggested that the victim's roommate helped cover up the murder. Hence, defendant clearly was not prevented from presenting the claimed defense by the trial court's refusal to grant the motion to admit the police reports. At best these reports would have been cumulative to the physical evidence and testimony presented at trial concerning a potential dark-skinned and sterile killer.¹⁶ Thus, even if we were to determine that the police reports were properly admissible under MRE 803(16) or (24), defendant cannot make the requisite showing that the alleged error affected the outcome of the trial. *Carines, supra* at 763. Consequently, there was no error warranting a new trial.

¹⁶ We further note that the beliefs held by the various investigators throughout the years regarding the ethnicity and virility of the potential killer are not substantive proof of the killer's actual ethnicity and virility. Hence, we find defendant's apparent reliance on these reports to show that the killer must have been dark-skinned and sterile to be misguided.

V. Judicial Misconduct

Defendant next contends that he was deprived of a fair trial when the trial court expressed annoyance with defendant's trial counsel and lectured him on basic aspects of evidentiary law. Therefore, defendant argues, he is entitled to a new trial. We disagree.

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Nevertheless, a defendant may be entitled to a new trial if the trial court's conduct "pierces the veil of judicial impartiality . . ." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The veil of judicial impartiality is destroyed where the trial court berates, scolds, and demeans a defendant's trial counsel so as to hold him up to contempt in the eyes of the jury. *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). The test to determine whether a new trial is mandated is whether "the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *Collier, supra* at 698, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). However, in assessing the trial court's comments, this Court will not take the comments out of context in order to show bias, but rather will examine them in the context of the whole record. *Paquette, supra* at 340.

On review of the entire record, we are not left with the impression that the trial court's comments unduly influenced the jury and, thereby, deprived defendant of a fair trial. The comments arose during the defendant's trial counsel's direct examination of retired detective Robert Carlson. Defendant's trial counsel repeatedly attempted to get Carlson to testify concerning statements made by persons Carlson had interviewed during his investigation of the victim's murder. In response to these attempts, the prosecutor repeatedly objected, which disrupted the orderly flow of testimony. After a series of these exchanges, the trial court interrupted and explained to defendant's trial counsel the types of things that Carlson could testify to without running afoul of the hearsay rule. Despite this, the objectionable questions persisted. Thereafter, the trial court again explained the types of things the witness could testify about without violating the hearsay rule. While the trial court's later comments do indicate that the trial court had become annoyed, they were not so intemperate as to hold defendant's trial counsel up to contempt in the eyes of the jury. *Wigfall, supra* at 773. Furthermore, the trial court's instruction that the jury should not be influenced by the trial court's rulings or comments and should decide the case only from the evidence, cured any minimal impact that this exchange may have had on the jury. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."). Therefore, a new trial is not warranted on this ground.¹⁷

¹⁷ We also reject defendant's argument that these comments indicate that the trial court was actually biased against defendant. Judicial expressions of impatience, dissatisfaction, annoyance, and even anger will ordinarily not support a bias or partiality challenge. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

VI. Prosecutorial Misconduct

Defendant next argues that he is entitled to a new trial because the prosecutor improperly withheld exculpatory evidence and elicited irrelevant and inflammatory testimony. We disagree.

Because defendant failed to object to any of the alleged misconduct before the trial court, these claims are unpreserved for appellate review. This Court reviews unpreserved claims of prosecutorial misconduct “for plain error affecting the defendant’s substantial rights.” *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To demonstrate plain error, the defendant must show that: “(1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant’s substantial rights.” *Id.* (citation omitted). The third factor requires that the defendant demonstrate that the error was outcome determinative. *Id.* Even if all of these elements are shown, this Court may not reverse unless the error resulted in the conviction of an actually innocent person or “seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* Finally, this Court will review claims of prosecutorial misconduct on a case-by-case basis, “examining the remarks in context, to determine whether the defendant received a fair and impartial trial” and “[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted).

Defendant first contends that the prosecutor’s suppression of exculpatory evidence constituted misconduct. While it is true that the intentional suppression of exculpatory evidence will warrant reversal, as will the suppression of potentially useful evidence if done in bad faith, *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989), defendant has failed to show that the missing statements were exculpatory in nature or that the prosecutor suppressed the statements in bad faith. Indeed, the only evidence presented was that some of the statements taken over the past three decades were missing from the file.¹⁸ From this evidence we cannot conclude that the prosecutor engaged in misconduct amounting to plain error affecting defendant’s substantial rights.

Defendant next argues that the prosecutor should not have elicited testimony concerning defendant’s drug activities. However, in each of the instances cited by defendant, the offending testimony was not directly responsive to the question posed by the prosecutor. Further, there is no evidence that the questions were framed in order to elicit the response actually provided. Hence, there was no misconduct on the part of the prosecutor in posing these questions.

Defendant also finds fault with the elicitation of testimony from retired detective Thomas Reeder concerning defendant’s sexual practices and claims by Igaz that defendant tried to rape her in front of friends. However, the testimony regarding defendant’s sexual practice was not elicited to prove the truth of the matter asserted, but rather was properly raised to explain to the

¹⁸ Defendant claims that the prosecutor should have provided copies of the original statements of Thomas Skeba and Linda Fairbanks as well as at least two statements by Maxine Braley. At trial, retired detective Roy Walton testified that Thomas Skeba and Linda Fairbanks made statements, which were recorded, but noted that they were now missing from the file.

jury how defendant eventually became a suspect when the police were originally seeking a possibly sterile killer. Therefore, it was relevant to defendant's theory of the case. Likewise, the prosecutor's question to Reeder about an alleged attempted rape was in response to questions posed by defendant's trial counsel on cross-examination and, therefore, were not improper.

Defendant also argues that the prosecutor should not have elicited testimony from Patricia Skeba that defendant hurt his wife. We note that this testimony was read into the record from a prior statement of the witness and was not the product of a question actually posed by the prosecutor.¹⁹ Further, this testimony is relevant to rebut defendant's 1976 statement that he "doesn't beat women" and his 1996 statement that he never beat his ex-wife. Finally, because this testimony was derived from a transcript of a previously made statement, it could easily have been redacted had defendant properly raised the issue before the trial court.

Finally, defendant claims the prosecutor engaged in misconduct by eliciting testimony from Igaz concerning several issues including (1) defendant's promiscuous sex life, (2) other acts unrelated to the other acts permitted by the trial court, (3) defendant's use of an alias, and (4) the fact that defendant ran from a federal warrant. We find no merit to any of these additional claims of misconduct. The prosecutor did not elicit testimony regarding defendant's promiscuous sex life, but rather properly asked Igaz if she knew that defendant was dating the victim, or any other women, around the time of the murder. In addition, Igaz's testimony about being backhanded by defendant was within the scope of the permitted other acts evidence. Finally, Igaz's testimony that defendant ran from a federal warrant was not responsive to the question posed by the prosecutor and the testimony concerning the alias used by defendant while residing in California was relevant to impeach defendant's credibility. Likewise, defendant's own statements made in 1996 raise the issue of his flight to California and his use of an alias. Hence, posing these questions did not constitute prosecutorial misconduct.

The prosecutor did not engage in misconduct and, therefore, there was no plain error affecting defendant's substantial rights.

VII. Ineffective Assistance of Counsel

Defendant next contends that he was deprived of the effective assistance of counsel. We disagree.

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). When evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment of the United States Constitution, or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standards established in *Strickland, supra* at 687. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an

¹⁹ See footnote 6 above.

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).

Defendant first claims that his trial counsel was ineffective for failing to object to inadmissible and prejudicial testimony such as the testimony that defendant attempted to evade a federal drug warrant, used an alias, committed violent acts, dealt drugs, and engaged in stalking behavior. As already noted above, much of this testimony was in fact admissible for a relevant purpose. Because trial counsel is not required to advocate a meritless position, the failure to object to admissible evidence cannot constitute the ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In addition, there is a strong presumption that defendant's trial counsel's decisions were simply a matter of trial strategy, *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001), and 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." *Id.* This presumption is further bolstered by defendant's trial counsel's previous experience with this case. Defendant's trial counsel had the benefit of conducting defendant's second trial, which occurred just a few months before the trial in question and ended in a mistrial. Defendant's trial counsel was aware of the evidentiary issues and the court's prior rulings. In addition, defendant's trial counsel interviewed the jurors from the previous mistrial and, as a result, had an understanding of how that jury viewed the progression of the trial and the evidence presented. Hence, defendant's trial counsel might simply have elected not to object to some marginally objectionable material because the benefit of potentially excluding the material was outweighed by the disruption to the presentation of the trial and the resultant attention that the objection would garner. Therefore, we cannot conclude that defendant's trial counsel was ineffective for failing to object to the listed testimony.

Defendant also claims his trial counsel should have objected to various hearsay testimony including the testimony regarding defendant's sexual practices, testimony concerning defendant's alleged attempted rape of Igaz, and testimony from Fairbanks that Patricia Skeba told her that defendant was talking about the victim's murder. As already noted above, the testimony regarding defendant's sexual practices and the redirect testimony regarding alleged statements that defendant attempted to rape Igaz were properly admissible and, therefore, defendant's trial counsel's objection would have been futile. *Snider, supra* at 425. Likewise, the testimony by Fairbanks that Patricia Skeba told her that defendant was talking about the victim's murder appears to have been offered to explain Fairbanks' distraught state at the time the conversation occurred and not to prove the truth of the matter asserted. Therefore, it was not hearsay. MRE 801.

Defendant next claims his counsel was ineffective for failing to object to Virani's "speculative testimony" about Hines' incompetence. We find no merit to this claim. Virani did not characterize Hines as incompetent, but rather explained how Hines' inexperience in forensic pathology might have affected his conclusions regarding the exudate found in the victim. Because this testimony was within the realm of Virani's expertise, it was properly admissible.

Thus, defendant's trial counsel could not be faulted for failing to object to it. *Snider, supra* at 425.

Defendant next claims that his trial counsel was ineffective because he stipulated to the admission of Patricia Skeba's prior statement, where the statement was made to the police, may not have been under oath, and where defendant did not have the opportunity to cross-examine her statement. We disagree.

At defendant's second trial, Patricia Skeba was called by the prosecution and asked about a statement she made to the police in 1976. While Patricia indicated that she recalled making a statement, she testified that she could not recall the details of the statement and could not independently recollect the events described in the statement. Based on this testimony, the prosecutor moved for the admission of the prior recorded statement under MRE 803(5). The trial court granted the motion after Reeder testified concerning how and when the statement was taken. Thereafter, Patricia read her statement into the record and, after she finished, defendant's trial counsel had the opportunity to cross-examine her. Because Patricia appeared at defendant's second trial, her statement to the police was not barred by the Confrontation clause of the Sixth Amendment. *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1365; 158 L Ed 2d 177 (2004). At defendant's third trial, the prosecutor could have repeated the same procedure to obtain the admission of Patricia's 1976 statement. Consequently, defendant's trial counsel's decision to stipulate to the admission of Patricia's testimony could not have prejudiced defendant and, therefore, cannot constitute ineffective assistance.

Finally, defendant argues that his trial counsel was ineffective for failing to obtain an expert on hair evidence, for electing to attempt to elicit crucial testimony through hearsay statements rather than by calling the relevant witnesses, and for failing to provide a basis for admitting the police reports. We disagree.

A trial counsel's decision whether to call a witness is presumed to be a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Furthermore, in order to establish the predicate for his claim, defendant must offer proof that an expert would have testified favorably if called for the defense, *id.*, which he has not done. In addition, defendant's trial counsel conducted a thorough and effective cross-examination of plaintiff's hair expert and effectively argued that the numerous hairs found on the victim could not be adequately explained through secondary transfer. On this record, we cannot conclude that defendant's trial counsel's decision not to retain the services of a hair expert as anything other than sound trial strategy. Likewise, defendant's assertion that his trial counsel could have obtained the admission of various witness statements through Carlson had he had a better understanding of the hearsay rule is nothing more than speculation as is his assertion that his trial counsel should have called the relevant witnesses. Finally, we have already noted that the admission of the information contained in the police reports would merely have been cumulative to the testimony elicited from the officers who actually conducted the investigation and, therefore, the failure to find a way to obtain their admission did not affect the outcome of the trial.

Defendant has failed to meet his burden of establishing that his trial counsel's performance fell below an objective standard of reasonableness and that this performance affected the outcome of his trial. Consequently, a new trial on this basis is not warranted.

VIII. Cumulative Error

Defendant also argues that, even if any of the claimed errors do not by themselves warrant a new trial, the cumulative effect of the errors warrants a new trial. We disagree.

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *LeBlanc, supra* at 591. In order to reverse on the basis of cumulative error, the effect of the errors must be so seriously prejudicial that they denied defendant a fair trial. *Ackerman, supra* at 454. Only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Because there were no actual errors to aggregate, defendant is not entitled to a new trial on this ground.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot