

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEROY BOSS,

Defendant-Appellant.

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UNPUBLISHED

July 31, 2007

No. 267013

Osceola Circuit Court

LC No. 05-003764-FC

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of premeditated first-degree murder, MCL 750.316. The trial court sentenced defendant to life in prison. We affirm.

Defendant's 14-year-old stepdaughter, Jennifer Gottschalk, died as a result of strangulation and multiple stab wounds between the evening of May 16, 1996, and the afternoon of May 17, 1996. Before her death, Jennifer resided with defendant and her mother in Merritt, Michigan. On May 16, 1996, defendant drove from Merritt to his parents' house in Baldwin, Michigan. The next day, Jennifer's dead body was discovered at a highway rest stop area located between Merritt and Baldwin. Defendant initially denied having any information regarding Jennifer's death. However, in 2001, defendant admitted to his sister, Beverly Boss, that he killed Jennifer. Police arrested defendant for Jennifer's murder in 2004.

Defendant argues on appeal that the evidence presented at trial was insufficient to establish that he killed Jennifer. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). To establish first-degree murder, under MCL 750.316, the prosecutor must show that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991).

On appeal, defendant does not disagree with the possibility that Jennifer's murder was premeditated and deliberate. Rather, he claims that there was insufficient evidence to establish his identity as the killer. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecutor must prove defendant's identity as the killer beyond a reasonable doubt. *People v Kern*, 6 Mich App 406,

409; 149 NW2d 216 (1967). Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime, including identity. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

We believe that the circumstantial evidence presented at trial was more than sufficient to establish defendant's identity as the killer. First, a reasonable juror could infer that defendant had a motive to kill Jennifer. Although not an essential element of a crime, proof of motive in a prosecution for murder is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). According to several witnesses, Jennifer accused defendant of sexually abusing her. Further, only a few weeks before her murder, Jennifer told a friend that she was pregnant and that defendant would arrange for her to have an abortion. A homicide victim's state of mind evincing discord in a relationship with the defendant can be relevant to issues such as the defendant's motive. See *People v Fisher*, 449 Mich 441, 450-453; 537 NW2d 577 (1995). Additionally, defendant admitted to his sister Beverly that he and Jennifer were sexually involved and that Jennifer threatened to "use the situation" to her advantage. Later, defendant expressed concern to his cellmate, Craig Church, that Jennifer was pregnant at the time of her death. He also indicated that Jennifer posed a threat to his marriage. Based on this evidence, a reasonable juror could infer that defendant killed Jennifer because he believed she was pregnant with his child and/or because she threatened to reveal his sexual abuse.

Further, the evidence presented at trial indicates that defendant had the opportunity to commit the murder. Jennifer's mother testified that defendant left their house in his van between 9:15 and 10:00 p.m. on the night of the murder and that, shortly after he left, she went to sleep. Defendant admitted to Beverly that he thereafter picked up the victim. Defendant's neighbor observed him leave the house again at 11:30 p.m. Less than two hours later, at approximately 1:15 a.m., a witness saw a van at the rest area where Jennifer's body was found. And, defendant's father testified that defendant may have arrived at his home in Baldwin as late as 2:00 a.m. Although mere presence at the scene of the crime, at the time the crime occurred, is insufficient to establish commission of the crime, evidence of opportunity and presence at the crime scene may contribute to a finding of guilt. *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002).

Defendant's statements and conduct after the killing also support his identity as the perpetrator. Defendant threatened Jennifer's friend, saying, "Jen was a big girl and [you're] small and [you] wouldn't be anything if [you] got in the way . . . ." The meaning of defendant's statement presented a question of fact to be resolved by the jury, and a juror could reasonably find defendant's statement incriminating. Moreover, according to Beverly, defendant admitted to killing Jennifer and, during the course of his admission, he revealed details about Jennifer's manner of death that were not disclosed to the public. Knowledge of the details of a crime may serve as incriminating evidence. *Bowman, supra* at 151-152. Later, defendant also made several incriminating statements to Church.

Defendant told Church that Jennifer "would be gone" if she interfered with his marriage, that he was afraid that Jennifer was pregnant when she died, and that he confessed the murder to his sister. While defendant argues that both Beverly and Church's testimonies lacked credibility, it is a well-settled principle that, "in reviewing a sufficiency argument, this Court must not interfere with the jury's role of determining the weight of the evidence or the credibility of

witnesses.” *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). Reversal is not warranted on the grounds of insufficient evidence.

Defendant next argues on appeal that the trial court abused its discretion when it precluded him from presenting certain testimony regarding Beverly’s character for untruthfulness. We review a trial court’s decision to exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If the trial court’s decision results in an outcome within the range of principled outcomes, it has not abused its discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Even if a trial court abuses its discretion in excluding evidence, reversal is warranted only if it affirmatively appears, after review of the entire record, that it is more probable than not that the court’s error was outcome determinative. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

At trial, Beverly’s mother and son testified that, in their opinion, Beverly is an untruthful person. The trial court subsequently indicated, without prompting, that it would not admit any more opinion testimony from Beverly’s family members about her character for untruthfulness. On appeal, defendant contends that the trial court should have allowed Beverly’s daughter to testify about her lack of truthfulness. We disagree.

Generally, all relevant evidence is admissible. MRE 402; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). MRE 608(a)(1) provides that the credibility of a witness may be attacked by opinion or reputation evidence if the evidence is limited to character for truthfulness or untruthfulness. But, even if evidence is otherwise admissible, it may be excluded if its probative value is substantially outweighed by the needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

Here, the testimony was properly excluded under MRE 403 because the admission of opinion testimony from Beverly’s daughter would have been needlessly cumulative. Moreover, considering that the jury heard Beverly’s mother and son testify about her character for untruthfulness, it is highly unlikely that the same testimony from a third member of her family would have altered the outcome of this case. *McLaughlin*, *supra* at 650.

Defendant next argues on appeal that the trial court abused its discretion when it precluded him from eliciting testimony about Church’s pending charges and Beverly’s outstanding warrants, to show possible bias or interest, without proof that they received favorable treatment in exchange for testifying. On cross-examination, Church admitted that he was released on bond shortly after reporting defendant’s incriminating statements to the police and that several of the charges pending against him were later dismissed. The trial court subsequently precluded defendant from asking Church any additional questions about his previous charges without proof that Church received “a deal placed on the record” in exchange for testifying. Later, Beverly admitted that there were outstanding warrants against her when she reported defendant’s confession to the police. The trial court then precluded defendant from questioning Beverly about the warrants without proof that she actually received something in exchange for testifying.

Generally, evidence of arrests not resulting in convictions is inadmissible for general impeachment purposes. *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). However, in *People v Torrez*, 90 Mich App 120, 124-125; 282 NW2d 252 (1979), we held that

evidence of pending charges is admissible to show that bias or interest may exist, even if the record does not reveal any actual promises made in exchange for the witness' testimony. "A defendant need not first demonstrate that some sort of deal exists before impeaching the witness in this manner as the cross-examination is a proper means to attempt to illicit [sic] the existence of a possible interest." *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

Here, evidence of Church's pending charges and Beverly's outstanding warrants was admissible to show possible bias or interest, even without proof that the witnesses actually received favorable treatment or a "deal placed on the record" in exchange for their testimonies. We therefore conclude that the trial court abused its discretion when it limited defendant's cross-examination of Church and Beverly in this regard.

Nevertheless, defendant cannot establish that it is more probable than not that the trial court's error was outcome determinative. *Lukity, supra* at 495-496; *McLaughlin, supra* at 650. There was ample evidence on the record for the jury to infer that Church received consideration for assisting the prosecution and defendant effectively attacked Beverly's testimony by other means. Moreover, evidence that defendant made incriminating statements to Church and Beverly was not the only evidence presented at trial establishing his guilt. Reversal is thus not warranted.

Defendant further argues on appeal that the cumulative effect of the trial court's errors denied him a fair trial. We disagree.

We review this issue to determine whether the trial court's errors, that do not warrant reversal standing alone, combined to deny defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). "In making this determination, only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Further, in order to reverse based on cumulative error, the errors at issue must be of consequence, meaning that the effect of the errors must have been seriously prejudicial. *Knapp, supra* at 388.

Here, the trial court did not abuse its discretion by excluding additional opinion testimony regarding Beverly's lack of truthfulness. Therefore, the trial court's decision to exclude the evidence cannot contribute to a finding of cumulative error requiring reversal. *Bahoda, supra* at 292 n 64. Furthermore, while the trial court abused its discretion in limiting defendant's cross-examination of Church and Beverly, the trial court's error was harmless. Therefore, reversal is not warranted on grounds of cumulative error. *Knapp, supra* at 388.

Defendant finally argues on appeal that his trial counsel rendered ineffective assistance of counsel. Because the trial court was not presented with and did not rule on defendant's claim of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel

is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

Defendant first argues that defense counsel rendered ineffective assistance of counsel by failing to claim that the exclusion of additional opinion testimony regarding Beverly's lack of truthfulness violated defendant's constitutional rights. A defendant's constitutional right to confront a witness, US Const, Am VI and Const 1963, art 1, § 20, is violated when unreasonable limitations are placed on his opportunity to test the witness' credibility. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). Considering that two of Beverly's family members testified about her character for untruthfulness, defendant cannot establish that the trial court placed unreasonable limitations on his ability to attack Beverly's credibility. Therefore, any constitutional claim raised by defense counsel would have been futile. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Furthermore, defendant cannot establish that defense counsel's failure to raise a constitutional claim fell below an objective standard of reasonableness and affected the outcome of this case. *Henry*, *supra* at 145-146.

Defendant next argues that defense counsel rendered ineffective assistance of counsel by failing to provide the jury with a reasonable theory of defense. We disagree.

Defense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902 (1996). Moreover, decisions regarding what evidence to present are presumed to be matters of trial strategy, *Dixon*, *supra* at 398, and we do not substitute our judgment for that of counsel in matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

While defendant asserts that defense counsel failed to present evidence that someone other than defendant may have committed the murder, he failed to specify what particular evidence, if any, defense counsel failed to present. Thus, defendant has failed to meet his burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Furthermore, contrary to defendant's assertion, we note that defense counsel presented evidence indicating that someone else may have murdered Jennifer, or that more than one person may have been involved in the murder.

Defense counsel elicited testimony that another man had sexual relations with Jennifer before her death and that Jennifer's mother threatened to have the man arrested. Defense counsel also highlighted evidence that two types of instruments may have been used to stab Jennifer and that there was more than one set of footprints found next to her body. Bearing this in mind, and considering that defendant failed to identify any additional evidence indicating that someone else committed the murder, there is no basis on which to find that defense counsel's failure to present additional evidence denied defendant a substantial defense. *Dixon*, *supra* at 398; *Hyland*, *supra* at 710.

Defendant finally argues that defense counsel rendered ineffective assistance of counsel by failing to move for directed verdict. Because there was more than sufficient evidence

presented at trial to establish defendant's guilt, a motion for directed verdict would have been futile. Defense counsel is not ineffective for failing to argue frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Furthermore, defendant cannot establish that defense counsel's performance changed the outcome of the case. *Henry*, *supra* at 145-146. Defendant thus failed to overcome the presumption of effective assistance of counsel.

On appeal, defendant asks for a remand for further fact finding, but he did not comply with MCR 7.211, which provides a means for requesting a hearing in the trial court to develop evidence. Even on appeal, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Thus, we decline to order a remand.

Affirmed.

/s/ William B. Murphy  
/s/ Brian K. Zahra  
/s/ Deborah A. Servitto