STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2009
v	No. 284096 Oakland Circuit Court
CAROL EGE, Defendant-Appellant.	LC No. 1993-125655-FC

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

After defendant stood trial on a murder charge for the second time in 2007, a jury convicted her of first-degree premeditated murder, MCL 750.316(1)(a), for which the trial court imposed a mandatory term of life imprisonment without parole. Defendant appeals as of right, and we affirm.

I

Defendant's conviction stems from a homicide that took place on February 22, 1984. Mark Davis found victim Cindy Thompson's beaten and stabbed body in the bedroom of the victim's rented home in Pontiac. At the time of the murder, the victim was seven months' pregnant with Davis's child. Defendant's first trial occurred in 1992, eight years after the crime. A jury convicted defendant of first-degree premeditated murder, and this Court affirmed the conviction. *People v Ege*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 1996 (Docket No. 173448). The Michigan Supreme Court denied defendant's application for leave to appeal. *People v Ege*, 456 Mich 911; 572 NW2d 658 (1997).

In July 2005, Judge David Lawson of the United States District Court for the Eastern District of Michigan granted defendant's petition for a conditional writ of habeas corpus. *Ege v Yukins*, 380 F Supp 2d 852 (ED Mich, 2005). The Sixth Circuit Court of Appeals affirmed in part, on the ground that improperly admitted expert bite mark testimony "substantially prejudiced the outcome of Ege's trial," and ordered her retrial or release from prison. *Ege v Yukins*, 485 F3d 364, 377, 380 (CA 6, 2007). Defendant's retrial took place in October 2007 and November 2007.

The Sixth Circuit supplied the following comprehensive yet concise overview of the evidence introduced at defendant's first trial:

"This is a troubling case. The crime is horrific. The initial investigation was deficient. Defendant was not charged until nine years after the murder. There are others who are logical suspects. No one saw defendant at the scene the evening of the murder. No physical evidence links defendant to the crime except testimony that a mark on the victim's cheek is a bite mark that is highly consistent with defendant's dentition." *People v Ege*, No. 173448, 1996 WL 33359075, at 1 n 1 (Mich Ct App, Sept 17, 1996).

Such was the description of Carol Ege's case by the Michigan Court of Appeals, which heard her direct appeal following a jury trial and conviction for first-degree murder for the killing of Cindy Thompson.

Ege and Thompson had both been romantically involved with Mark Davis, whose child Thompson allegedly was carrying. Davis testified that he found Thompson in her upstairs bedroom some time before 5:00 a.m. on February 22, 1984, bludgeoned and stabbed to death, her organs laying beside her. There was no sign of forced entry at Thompson's home, and the back door was found unlocked. The phone cords had been cut. Thompson was last seen alive on the evening of February 21, sometime between 8:45 and 9:15 p.m. The initial police investigation, concluded in April 1984, yielded no definitive evidence. Eight years later, however, the investigation was reopened as a result of persons coming forward with evidence allegedly incriminating Ege. During the course of this reopened investigation, in 1992-1993, evidence that had been collected at the murder scene in February 1984 was submitted to the Michigan state crime lab for the first time. None of the evidence submitted to the crime lab connected Ege to the crime. The lab results yielded fingerprints of Davis and Thompson and hairs of Thompson and others, but no similar trace evidence connected to Ege. Thompson's body was exhumed in 1993, apparently to investigate a mark on her left cheek visible in photographs taken at the murder scene. The initial autopsy report had concluded that the mark was livor mortis.[1] Ege was tried for murder following the 1992-1993 investigation.

At trial, the prosecution attempted to show that Ege was obsessed with Davis and was therefore furiously jealous of Thompson and the child Thompson was carrying. The prosecution presented witnesses who testified that Ege and Thompson had argued several years prior to Thompson's death, when Ege entered Thompson's house to destroy a watch case and T-shirts that Thompson had bought for Davis. Further evidence was presented that Ege and Thompson engaged in a physical struggle at Thompson's sister's house, when Thompson was five months pregnant. Witnesses also testified that Ege had attempted to hire two different men to kill Thompson, and that about one week before Thompson's

[1] Livor mortis, also known as postmortem lividity, is a form of skin discoloration caused by the settling of blood, often marking the location where a body suffered some sort of blow or trauma. Dorland's Illustrated Medical Dictionary, 1060 (30th ed, 2003).

> death, Ege had asked her roommate, Carol Parker, to provide her with an alibi in exchange for free rent. Finally, several witnesses testified that Ege had expressed to them a desire to see Thompson killed. One witness testified that after Thompson became pregnant, Ege said to her, "Cindy [Thompson] was not going to have the baby; that she didn't know how or why, and she didn't want to get me involved, but that she wasn't going to have the baby." Another witness testified that Ege told her "she could stomp the baby out of her, slit her throat, rip her up in little pieces and think nothing of it." Yet another witness testified that Ege told him she wanted Thompson "really hurt bad, either beat her up bad or kill her."
>
> Ege denied virtually all of the allegations made by prosecution witnesses, and much of their testimony was called into serious question on cross-examination, either through impeachment or showing of bias. The defense's theory of the case was that Ege could not have been at the crime scene on the evening of the murder because she was at home all evening, and that although there was perhaps some evidence pointing to her, a more compelling circumstantial case could in fact be made against several of the prosecution's witnesses, including Davis. Davis admitted that he had been drinking most of the day and night prior to Thompson's murder, and that by the time he decided to go to Thompson's house on the morning of February 22, he had consumed approximately five bottles of wine. Davis's presence at Thompson's house coincided approximately with the time she died. His alibi that he was drinking at a friend's house up until the time that he found Thompson's body was largely undermined by the friend's subsequent testimony that he and Davis were not in fact together that night. Also on cross-examination, Davis testified that he never believed that Ege had killed Thompson, and affirmed that Ege had in fact been home all night. [*Ege*, *supra*, 485 F3d 367-368.]

At defendant's second trial, the prosecution presented virtually the same evidence it had produced in 1992, with the exception of the bite mark evidence and the testimony of the witness who claimed defendant had threatened to "stomp" the baby out of the victim and slit the victim's throat.

II

Defendant initially contests the sufficiency of the evidence supporting her conviction, contending that the entirely circumstantial evidence introduced at trial gave rise at most to only "a reasonable speculation" that she killed the victim. We review sufficiency of the evidence challenges de novo to determine 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 Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). When reviewing the trial evidence to ascertain whether its sufficiency supports a conviction, this Court will not interfere with the trier of fact's role to determine the weight of evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). It remains for the trier of fact to decide what inferences fairly arise from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A reviewing court must "draw all

reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, *supra* at 400.

A. Evidence Presented at the 2007 Retrial

Defendant shared a spot in a classic "love triangle" with Mark Davis and the victim. Defendant and Davis had known each other since childhood, and began living together in the early 1980's. Davis had also known the victim since childhood, but had not seen her for a considerable period of time before 1982. At some point that year, the victim visited the party store where Davis worked. Soon thereafter, Davis began dating the victim; Davis continued to live with defendant even after he had commenced a sexual relationship with the victim. By the end of 1982, defendant had learned of Davis's relationship with the victim, but continued to live with him.

In October 1982, the victim moved into an apartment complex in Oxford. Barbara Lambert, who described herself as the victim's "best friend," lived "kitty corner across the hall" from the victim. The apartment tenants were "very friendly," and often left their apartment doors open. On an unspecified date in December 1982, Lambert and the victim sat talking in Lambert's living room. Because Lambert's apartment door was open, Lambert heard "some commotion" coming from the direction of the victim's apartment. The victim and Lambert went into the victim's apartment and discovered "two females" inside. The two intruders "were ripping up t-shirts." The victim "started making quite a fuss, yelling." Lambert identified defendant as "possibly" one of the two female intruders, adding, "I don't know, it's been so many years." Lambert recalled that "[t]here was yelling and screaming back and forth," that the victim referred to one of the females as "Carol," and that "Carol" expressed that the victim would "never have Mark."

Deborah Dunn corroborated Lambert's testimony regarding the 1982 events in Oxford. Dunn identified herself as a friend of defendant, and testified that she and defendant drove to the victim's apartment because the victim "had gotten Mark some Christmas presents and Carol did not want him to have those, so she was taking them back." Dunn recalled that defendant walked into the victim's apartment and "started ripping up the t-shirts," and then smashed a watch case that the victim had given to Mark. Lambert described that the victim came in and yelled at defendant to leave, "there was some words exchanged," and she and defendant departed.

In approximately July 1983, the victim learned that she was pregnant. Davis never entertained any doubt that he was the baby's father, and expressed happiness about the pregnancy. He loved the victim, and planned to move in with her. Defendant learned of the victim's pregnancy a few months before the victim's murder.

In September 1983, defendant drove to a store with her friend, Sheryl Hooker. Defendant bought four bottles of wine and cigarettes for Davis.[2] Hooker recounted that defendant "was upset that Cindy was pregnant" and claimed to have asked Davis to suggest to the victim that she

[2] Davis admitted that during the time of these events, he daily consumed a case of beer or five or six bottles of Boone's Farm wine, and smoked three or four marijuana cigarettes.

have an abortion. Defendant also offered that if the victim refused an abortion, defendant and Davis could adopt and raise the baby. During the same conversation, defendant expressed that "she didn't understand Cindy and why she wanted this baby so much, she goes she just makes me so mad I could kill her and she hit the steering wheel." Defendant also believed that the baby would be born "deformed."

Several witnesses testified that on December 13, 1983, defendant physically assaulted the victim. At that time, the victim lived in a Waterford Township home with her older sister, Shirley Howells, and Howells's 14-year-old daughter, Kelly. During the late afternoon or early evening of December 13, 1983, the victim drove Kelly to a store. After they left, Howells went down to her basement to talk on the telephone with a friend. She "heard a knock on the back door," and walked up the basement steps to see who was there. Howells observed a "blonde girl standing on my porch," whom Howells identified as defendant. Defendant asked for Cindy, and Howells related that Cindy was not at home but would return in about 20 minutes. Howells asked defendant who she was, and defendant replied that her name was Lisa. Howells then returned to the basement and completed her telephone call.

When Kelly and the victim returned from the store, the victim denied knowing anyone named Lisa. Howells recalled that she and the victim went into the basement, where Howells made another phone call to a friend named Ruthann. Howells again heard a knock on the back door, and asked her friend to hold. She and the victim went upstairs, and the victim identified the person at the door as "Carol Sanders."[3] Howells opened the door, advised defendant that the victim did not want to talk to her, and asked defendant to leave. According to Howells, defendant "stepped or tried to step into my door, she put both hands on my shoulders and forced her way inside." As Howells tried to push defendant out, "all of sudden out of the dark a man comes flying at me, grabs my arm and says get your hand off of her and let them talk." Defendant then "grabbed" the victim, and Howells heard "bumping and scuffling on the steps going down into the basement." The man instructed Howells and Kelly not to use the phone and to stay in the room. The victim yelled for Howells to call the police, and Howells responded that she could not make the call because the basement phone was off the hook. Howells described that she and the male intruder "both heard Cindy grab the phone or into the phone say Ruthann, call the police[.]" The man then shouted to defendant "let's get out of her[e] and she came up the stairs and the two of them went out the backdoor."

The victim told Howells that while they were in the basement, defendant "wouldn't let go of her," so she "smack[ed]" defendant and grabbed the phone. A Waterford Township police officer arrived, obtained a report, and showed Howells that "there were cut wires just dangling" outside the house, apparently related to the cable television.

Richard Lingnau testified that he had accompanied defendant to Howells's home. Lingnau recounted that two months before the events in Waterford, defendant told him that "she wanted Cindy really hurt bad, either beat her up real bad or kill her." Defendant offered him two to three hundred dollars to accomplish this. On December 13, 1983, he went with defendant to

[3] In 1984, defendant's last name was Sanders.

Howells's home in Waterford. Lingnau intended to "kill Cindy," but fled when he realized that the victim was using the phone to call the police, and that other witnesses were present. Lingnau admitted on cross-examination that at the time of these events he drank 10 beers a day and had recently been released from confinement in a mental institution.

A Waterford Township police officer testified that on December 13, 1983, he responded to a dispatch and took a report indicating that there had been a "pushing match" between defendant and the victim. Defendant was charged with assault and battery. At a hearing conducted a week after the victim's death, defendant pleaded guilty to trespassing and the prosecutor dismissed the assault and battery charges.

Hooker also corroborated the December 13, 1983 physical encounter between the victim and defendant. Hooker testified that on that date, the victim called and sounded "a little hyper, excited about what had just occurred," and related that "Carol had come to her door and had attacked her and her sister and restrained them, that the phone cords had been messed with, they had already had the police out there." Hooker recalled that during this conversation the victim described that she and defendant "had a tussle," and that defendant "tried to push her down the stairs."

Timothy Apker described himself as a friend of both defendant and Davis. He recalled that at a December 1983 party at the home of Nancy Davis, Mark Davis's mother, Nancy referred to the victim as "a scum bag," stated that "the baby was gonna be deformed," and expressed that she "wanted Cindy gone. … Murdered. Killed. Destroyed." At another party the next month, Nancy told Apker that defendant wished to speak with him. He and defendant drove to a Taco Bell, where defendant explained that Davis had gotten the victim pregnant, planned to move in with her, and that the baby would be deformed. Defendant also shared with Apker that she had "charges against her," and that she "hated" the victim. According to Apker, defendant offered him $350 to $500 or $1000 to kill the victim, and asked him to find someone to do it if he would not. Apker denied making any effort to find someone to kill the victim. He testified that defendant called him approximately three times to find out if he had located anyone. When he told her that he had not, defendant "made the comment that if it's going to be that way, if you can't find somebody, I'll do it myself." About eight days before the murder, defendant appeared at Apker's place of employment with Apker's ex-wife, Carol Deer, and the Apkers' young child, Tiffany. Defendant and Apker drove to Burger King, where defendant again asked Apker if he was interested in killing the victim or knew of anyone willing to do so.

Deer moved in with defendant and Davis in February 1984, after leaving her second husband. When defendant offered Deer a place to live, Deer suggested that she would pay rent. Defendant declined Deer's suggestion, stating, "I just want you to be my alibi." When Deer asked defendant what she was talking about, defendant related that Davis had gotten the victim pregnant "and she didn't want her to have the baby." Deer asked defendant "what she was gonna do," and defendant made a gesture with her hand, slashing her throat. Defendant also stated that she "was gonna have Cindy killed, she wanted her dead because the baby was gonna be deformed . . . ." According to Deer, defendant also admitted that she and "Richard" had gone to the victim's sister's home "to try to cause her to lose the baby and that didn't work."

In early February 1984, the victim moved into a rented home located at 97 Seneca Street in Pontiac. On February 20, 1984, between 11:30 p.m. and midnight, Sheila Walker drove down

Seneca on her way home from work. Walker recalled that a pickup truck had parked on the right side of Seneca with the driver's door open. A car parked on the left side of Seneca, across from the pickup, blocked the street. Walker pulled her Cadillac behind the pickup, lit a cigarette, and rolled her windows part way down. Walker saw two people standing on the porch at 97 Seneca and heard a loud argument coming from the porch. One of the people on the porch was a tall skinny girl with long blonde hair, whom Walker subsequently identified as defendant. A female stood in the doorway of the house, and told the two people on the porch "to leave her alone." Walker testified that the blonde woman called the female in the doorway a "lying bitch," and yelled that "the baby wasn't his." The confrontation lasted between 10 and 15 minutes. It ended when a small red car pulled up behind Walker's car, and a woman emerged who ran onto the porch. The woman said, "let's go," and brought the blonde down the stairs. The blonde got into the small car and it drove away. The man left the scene in the pickup truck.

That same evening, the victim called Julie Thompson, the victim's sister-in-law, and reported that she had just had an argument with defendant and Troy Collings. Other testimony established that Collings lived with Nancy Davis and drove a pickup truck. The victim sounded "hysterical," and it took Thompson quite a while to calm her down. Although the victim was murdered two days later, Thompson did not tell the police about this conversation until 1992.

Shortly before 5:00 a.m. on February 22, 1984, Mark Davis found the victim's body in the upstairs bedroom of the home on Seneca. Dr. Ljuvisa Dragovic described that the victim had been bludgeoned about the head, probably causing her to lose consciousness. The wounds on the victim's head were consistent with impacts from the side of a ball-peen hammer. After the victim lost consciousness, the assailant slashed the victim multiple times on the neck and chest. One slash severed the victim's spinal cord, and the tip of the knife could have been bent while making this wound. One stab wound penetrated the victim's liver and the top of the uterus, ceasing the flow of oxygen to the victim's seven-month-old fetus. Dr. Dragovic estimated that the victim could have been killed between 9:00 p.m. on February 21, 1984 and 1:00 a.m. on February 22, 1984.

The police investigation yielded multiple fingerprints in the victim's bedroom belonging to Davis. None of the fingerprints found at the victim's home matched defendant. Other fingerprints found at the scene remained unidentified. No physical evidence connected anyone to the murder scene other than Davis. There was no indication of forced entry into the home, and Davis admitted to having a key. Two phone cords had been severed, including one in the victim's bedroom. Davis claimed that he had spent the evening at home drinking wine and smoking marijuana, and drove to the victim's home before 5:00 a.m. to retrieve some "pot" he had stored in her refrigerator.

Deer testified that on the morning after the murder, she called defendant at defendant's place of employment and informed her of the victim's death. That afternoon, Deer and defendant drove to the police station to answer questions. Deer quoted defendant as instructing her to "just tell them you don't know anything, because you don't," and that "Mark doesn't know anything either." A few days later, Apker anonymously contacted the Pontiac police department. A police officer identified his voice, and persuaded him to engage defendant in a conversation while wearing a body wire. On April 3, 1984, Apker had lunch at a restaurant with defendant, Deer, and Tiffany, and the police recorded their discussion.

Three years later, in approximately 1987, Alfred Mallett called the police and told them that he possessed evidence that incriminated defendant. Mallett related that he and defendant had moved in together in 1984 or 1985. Although Mallett wanted to get married, defendant did not, apparently because she still cared for Davis. Defendant told Mallet that she had been a suspect in a homicide, and that she hated the victim. According to Mallett, defendant pointed out the home in Pontiac where the murder had occurred. Defendant denied involvement in the murder, and said that "if she . . . ha[d] done it she would have dressed up like a Ninja and waited" at the victim's home. Defendant left Mallet because she started seeing someone else, and Davis helped her to move out. Mallet moved to Florida and put his belongings in storage.

Mallett returned to Michigan in 1987, and unpacked the items he had stored. In one of the boxes, he found a knife with a broken or bent tip that had what looked like "hair and blood and gristle" stuck to it. He put the knife in the dishwasher. Mallett thought that the knife might have been used in the victim's murder, so he called the police and arranged for them to obtain it. Testing of the knife failed to reveal any blood or foreign material. In 1992, Mallett provided the police with another box of items that he claimed had belonged to defendant. The box contained three hammers.

In 1993, the police reopened their investigation of the victim's murder. The victim's body was exhumed for additional examination, and all of the evidence gathered at the scene was tested for trace DNA evidence. The retesting yielded no additional information connecting defendant to the crime. On April 26, 1993, defendant consented to a taped interview with two Pontiac detectives, and the prosecution played the tape for the jury. During the police interview defendant denied any recall of the incident at the Oxford apartment involving the torn t-shirts, disputed that she "touch[ed]" the victim during the scuffle at Howells's home, and claimed that she lacked any knowledge of the victim's Pontiac residence.

Defendant did not testify at the trial. Throughout the proceedings, her counsel attempted to cast doubt on her guilt by establishing motives and opportunity for others to have killed the victim, particularly Davis, his mother, and Collings. The jury convicted defendant of first-degree murder after a nine-day trial.

B. Sufficiency of the Evidence Analysis

To establish first-degree murder under MCL 750.316(1)(a), the prosecutor must prove "that the 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). Defendant does not challenge the premeditated nature of the victim's murder, she insists only that the evidence failed to support a reasonable inference that *she* murdered the victim. Although the prosecution presented entirely circumstantial evidence of defendant's identity as the killer, identity may be proved through circumstantial evidence alone. *People v Sullivan*, 290 Mich 414, 418; 287 NW 567 (1939). Despite that no direct evidence established defendant's presence at the scene of the crime during the evening of the victim's murder, multiple pieces of evidence supplied reasonable inferences that defendant killed the victim. *Hardiman*, *supra* at 425-426.

The circumstantial evidence supporting defendant's identity as the perpetrator proved defendant's (1) motive, (2) previous threats to kill the victim, (3) prior acts of aggression toward the victim, and (4) possession of weapons that she could have used to commit the murder. In

combination, this evidence constituted a sufficient basis from which a rational jury could conclude, on the basis of reasonable inferences and beyond a reasonable doubt, that defendant murdered the victim. The prosecution established that defendant possessed several motives to kill the victim. Defendant expressed hatred of the victim because of the victim's relationship with and impregnation by Davis. Furthermore, defendant was charged with assaulting and battering the victim, and was scheduled to appear in district court a week after the victim's murder. An accused's motive bears on her identity as the perpetrator of the offense. *People v Flynn*, 93 Mich App 713, 722; 287 NW2d 329 (1979). "In cases in which the proofs are circumstantial, evidence of motive is particularly relevant." *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008).

Abundant evidence also established that defendant had threatened to kill the victim. Hooker related that in September 1983, defendant expressed that the victim "just makes me so mad I could kill her[.]" Apker recounted defendant's assertion that if he refused to kill the victim, "I'll do it myself." Apker's testimony established that defendant had solicited him to kill the victim, further evidencing defendant's motive and intent. Defendant also asked Deer to supply an alibi during the same conversation in which she indicated with a gesture that she intended to slash the victim's throat. Evidence of a defendant's prior threats against a victim qualify as "highly probative" evidence of motive and identity. *People v Armentero*, 148 Mich App 120, 133; 384 NW2d 98 (1986); see also *People v Milton*, 186 Mich App 574, 577; 465 NW2d 371 (1990), remanded on other grounds 438 Mich 852; 473 NW2d 310 (1991).

On three separate occasions, defendant appeared at the victim's residence and behaved in an aggressive manner. In 1982, defendant entered the victim's apartment without permission and destroyed some personal property. On December 13, 1983, defendant physically assaulted the victim in Howells's home. Two days before the murder, defendant confronted the victim on the victim's porch and argued loudly with her. These acts permit reasonable inferences that defendant possessed an opportunity to kill the victim, knew where the victim lived, and harbored an intent to harm the victim. *People v Morris*, 139 Mich App 550, 557; 362 NW2d 830 (1984). See also *People v Orr*, 275 Mich App 587, 592; 739 NW2d 385 (2007), citing *Morris*, *id*., for the proposition that "evidence of prior assaults of a victim is probative of the issue of intent in a later-charged murder of the same victim and, therefore, is not unduly prejudicial."

Mallett's testimony regarding the knife with the bent tip and the "hair and blood and gristle" also supported a rational inference that defendant killed the victim. The jury possessed the prerogative whether to credit Mallett's explanation regarding his discovery of the knife and his decision to put the knife in the dishwasher, despite the alleged incredibility of Mallett's account. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

The facts in this case thus give rise to a series of reasonable inferences of defendant's identity as the murderer, flowing from defendant's motive, expressed intent, and opportunity to kill the victim. Reasonable inferences arising from the evidence permit a rational conclusion beyond a reasonable doubt that defendant hated the victim enough to kill her, intended to kill the victim, had the opportunity to kill the victim, and owned a weapon that she could have used to kill the victim. Although each link in the prosecution's chain of proof against defendant is circumstantial, the conjoined inferences flowing from the evidence are neither speculative nor irrational, and therefore permit a jury to reasonably conclude beyond a reasonable doubt that defendant committed the murder. The jury rejected the notion that anyone else killed the victim,

despite evidence strongly suggesting that a third party may have committed the crime; "[a] rational jury might well have acquitted without violating its oath; but, drawing all reasonable inferences in favor of the prosecution, a rational jury could also convict." *Stewart v Coalter*, 48 F3d 610, 616 (CA 1, 1995).

III

Defendant next avers that the trial court violated her right to due process by denying her motion to suppress Sheila Walker's 1984 and 1992 identifications of defendant; according to defendant, the totality of the circumstances demonstrated a substantial likelihood that Walker misidentified defendant and that no independent basis existed for Walker's identifications. We review a trial court's decision to admit identification evidence for clear error. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists when the reviewing court is left with a "definite and firm conviction that a mistake has been made." *Id.* Constitutional claims involving due process of law are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A. Background Facts

Two days before the murder, Walker saw and heard three people arguing on the victim's front porch. Walker first disclosed her knowledge of the argument in April 1984, when she spoke with a friend named Deborah Woodward. Woodward knew both the victim and Sheryl Hooker. Shortly after the victim's death, Walker told Woodward about the events on the porch, and Woodward told Hooker. In April 1984, Hooker met with Walker and showed her seven photographs. The photos depicted (1) "Mark Davis sitting in his van," (2) Nancy Davis, (3) Dave Hooker, Sheryl Hooker's husband, Mark Davis, and defendant sitting in the background at a picnic table, (4) defendant sitting in a beanbag chair, "playing with her hair," (5) Carol Deer, (6) another photo of Deer, and (7) Mark Davis with a friend named Jeff Bostwick. The parties have not supplied this Court with any of the photos apart from the photo of defendant sitting in a beanbag chair.

Hooker recalled that she showed the photos to Walker and asked her if anyone looked familiar. Walker selected the photo of defendant sitting in the beanbag chair and one of the photos of Davis. Walker expressed certainty that defendant was the woman who had been on the victim's front porch, but with respect to Davis, Walker commented, "I believe this guy looks similar, but I can't be sure." Walker did not select the second photo of defendant included in the array. Hooker claimed that she told the police about her detective work in 1984.

In 1992, Pontiac detective Jane McLaurin Walter met with Sheila Walker. Detective Walter showed Walker an array of 30 to 50 photos that included the same seven photos used by Hooker in 1984. Walker picked three photos, including defendant in the beanbag chair, the photo of Davis sitting in his van, and a photo of a woman named Kerry Thompson, who Walker "thought was the person that came in a little sports car and took . . . the other . . . female away." Detective Walter recalled that Walker felt certain that defendant was the woman from the victim's front porch, and that Walker "believed [Davis] . . . was the guy that was on the porch." Walker never identified defendant in the courtroom.

Before defendant's first trial commenced in December 1993, the trial court conducted a *Wade* hearing. *United States v Wade*, 388 US 218, 227, 240-241; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). At the conclusion of the hearing, the trial court ruled as follows:

> I have had a chance to listen to the testimony and review People's Exhibit No. 1, which contains the totality of the array pictures. And although it's true that the one picture of Carol Ege shows that she appears to be a tall person, at least from the photo, however, I don't think she's a tall person in person, just my observing her, and that her hair appears to be long. When you—this was part of a hodgepodge of pictures of which there are several females who were blonde, some of whom . . . had long hair, and there appears to have been no suggestion or no intent on the officers' part to place that picture in a position so that it would stand out from all the others. Although it is somewhat different, I cannot say based on my review of the totality of pictures—and there was more than 10 . . . . This Court cannot conclude as a matter of law or fact that the pretrial identification procedure was so suggestive in light of the totality of circumstances, that it led to a substantial likelihood of misidentification.

In 2007, defendant filed a motion to suppress evidence of Walker's 1984 and 1992 identifications. Defendant admitted that no Michigan authority had addressed the suppression of a "civilian" assembled photo display, but argued that the facts surrounding Hooker's "amateur" detective work should factor into the totality of circumstances analysis required under *Wade* and its progeny. The trial court ruled,

> I want to say I've gone over all these motions several times and in this situation whether or not a show up conducted by a private person factors in the *Wade* line of cases, I don't believe that's really the gist of what your argument is. I think what you're saying is this is more of a due process that the procedures and the totality of circumstances are unreliable. I cannot make that determination as a matter of law. I do believe that under the circumstances, fact issues arise which would include if you wish to have an expert testify on the assertions you're making . . . .
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> . . . The bottom line is, is that I cannot decide as a matter of law that this procedure or the identification was so unreliable. I do find it to be a fact issue, it can be covered not only in cross-examination, but you can certainly call an expert witness to show the impact of what you argue in your brief. So the motion to suppress identification is denied.

B. Governing Legal Principles Regarding Identification Evidence

Defendant now challenges in this Court both Walker's 1984 and 1992 identifications, contending that because the 1984 procedure improperly suggested defendant, it tainted the 1992 identification. Defendant further argues that the trial court erred by failing to determine whether the 1984 identification procedure qualified as impermissibly suggestive under the totality of the circumstances.

In *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 (1993), the Michigan Supreme Court observed that "the relevant inquiry" is not whether an identification procedure is suggestive, but "whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *Id*. at 306. In *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), the Supreme Court considered whether a photographic identification procedure in which a police officer showed the victim a single photograph of the defendant qualified as unduly suggestive. The Supreme Court began its analysis by observing that "[a] photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Id*. The Court characterized as "highly suggestive" the one-photograph procedure used to identify the defendant, observing that an improper suggestion may arise when the witness is shown only one person, or a group in which one person is singled out in some way. *Id*. After finding the officer's technique unduly suggestive, the Supreme Court considered whether the victim possessed an independent basis for identifying the defendant in court, applying a totality of the circumstances test. *Id*. at 114-115. In determining whether an independent basis for identification existed, the Court in *Gray* utilized eight factors described in *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977), reciting them as follows:

> 1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification ….
>
> 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
>
> 5. Any previous proper identification or failure to identify the defendant.
>
> 6. Any identification prior to lineup or showup of another person as defendant.
>
> 7. . . . (T)he nature of the alleged offense and the physical and psychological state of the victim. "In *critical situations* perception will become distorted and any *strong* emotion (as opposed to mildly emotional experiences) will affect not only what and how much we *perceive*, but also will affect our *memory* of what occurred." [Citation omitted, emphasis in original].
>
> Factors such as "*fatigue, nervous exhaustion, alcohol and drugs*," . . . and age and intelligence of the witness are obviously relevant. Levine and Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U Pa L R 1079, 1102-1103 (1973). [Citation omitted, emphasis in original.]
>
> 8. Any idiosyncratic or special features of defendant. [*Gray*, *supra* at 116.]

After analyzing the facts of *Gray* in conformity with these eight factors, the Supreme Court held that despite the impermissibly suggestive identification procedure, the victim "had a sufficiently independent basis for her in-court identification of the defendant." *Id.* at 124.

C. Application

1. 1984 Display Conducted by Hooker

With respect to defendant's contention that the 1984 photo display was impermissibly suggestive, we will assume without deciding that a due process analysis applies to this civilian-conducted photo display. Defendant has not given this Court a copy of the full 1984 photo array. She contends that the collection of photos Hooker showed to Walker unduly suggested defendant because the photos included men and women and two pictures of defendant had her name written on the backs.[4]

Given the incomplete state of the instant record, it is impossible for us to conclude that the 1984 photo display was unduly suggestive. No evidence supports that defendant looked distinctly different from the other two women who appeared in the photos, or that any qualities of the photos specifically suggested defendant or singled her out in some manner. Moreover, "[p]hysical differences generally relate only to the weight of an identification and not to its admissibility." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

But even assuming that the photos of defendant did qualify as unduly suggestive, defendant has failed to show that under the totality of the circumstances any suggestiveness resulted in a misidentification. Walker testified that the confrontation on the victim's porch lasted for 10 to 15 minutes, during which she focused on the blonde "because she was just so mad." Walker explained that "you kinda hope she stayed up on the porch, but you know, don't come near the car." Walker described that the woman's long blonde hair and her "skinny" appearance "really stands out to me." According to Walker, "it wasn't really dark, it was light," either because of light supplied by a nearby credit union, the moon, or street lights. Walker added that the woman's face had no "markings," but she recalled that it was a "skinny face." The blonde walked "right beside my car" when she entered the red car that had pulled up behind

[4] The trial court erred by failing to rule on the suggestiveness of the 1984 photo identification. The trial court incorrectly deemed any suggestiveness inherent in the Hooker display a "fact issue" that could be covered in cross-examination and through the use of expert testimony. Whether an identification procedure violates a defendant's due process rights presents a legal question. *Foster v California*, 394 US 440, 443; 89 S Ct 1127; 22 L Ed 2d 402 (1969); *Kachar*, *supra* at 96-97; *People v Riley*, 33 Mich App 721, 727-728; 190 NW2d 569 (1971). Despite the trial court's failure to conduct a *Wade* hearing with respect to the 1984 identification, this Court may properly determine whether Walker's identification testimony qualifies as constitutionally inadmissible. *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984) ("An appellate court reviews a trial court's determination following a *Wade* hearing by examining the totality of the circumstances surrounding the challenged pretrial identification and determining whether those procedures were so impermissibly suggestive that they gave rise to a substantial likelihood of misidentification.").

Walker's. Walker recalled picking out defendant's photo when she met with Hooker, and asserted that she "was real sure that it was the woman" on the porch.

Applying the *Kachar* factors, Walker had a very good opportunity to view the blonde woman because of the length of the porch confrontation, the lighting in the area, and the fact that the woman walked close to Walker's car. Walker identified defendant less than two months after seeing her, and Walker's description of the woman on the porch correlated closely with defendant's actual appearance. Although Walker had no prior relationship with defendant and did not identify defendant in the second photo offered by Hooker in which defendant appeared, under the totality of the circumstances a sufficiently reliable basis existed for Walker's 1984 identification of defendant.

2. 1992 Police Photo Showup

Defendant also challenges the trial court's 1994 ruling regarding the 1992 police photo showup procedure. The trial court ruled that it could not find "as a matter of law or fact that the pretrial identification procedure was so suggestive in light of the totality of circumstances, that it led to a substantial likelihood of misidentification." Defendant claims that the police improperly included the beanbag chair photo in their array. According to defendant, because that photo reveals only a small portion of her face and the background includes a stuffed tiger, a television set with a long antenna, and the "very retro bean bag chair," the photo itself "stick[s] out like a sore thumb." Defendant insists that because the beanbag photo was strikingly memorable, the 1984 photo array featuring this picture tainted the 1992 photo display.

An improper initial identification procedure may unduly influence any subsequent identification. *People v Carter*, 415 Mich 558, 598; 330 NW2d 314 (1982).[5] But even assuming that the 1984 identification improperly suggested defendant, Walker's 1992 identification of defendant's photo qualifies as independently reliable. Walker testified that when she picked out defendant's photo in 1992, she felt "very sure" that it was the blonde woman from the victim's porch. She recalled the woman eight years later "[f]rom being so angry on the porch. She was very angry and very . . . , I thought she was gonna beat the girl up or worse." The trial court opined that under the totality of the circumstances, the 1992 identification did not lead to a substantial likelihood of misidentification. Our review of the *Kachar* factors yields no evidence suggesting that the trial court clearly erred in allowing Walker to testify regarding her 1992 identification of defendant's photograph. *Hornsby*, *supra* at 466.

IV

Defendant complains that the trial court impermissibly infringed on her constitutional right to present a defense when it ruled that her counsel could not question Kim Clarke, Mark Davis's sister, about Davis's acts of anger and violence. Defendant characterizes "[t]his evidence []as crucial to the defense theory that Mark Davis, the first police suspect in this case,

[5] Overruled in part on other grounds in *People v Robideau*, 419 Mich 458, 483-485; 355 NW2d 592 (1984), which itself was overruled in *People v Smith*, 478 Mich 292, 312-315; 733 NW2d 351 (2007).

killed Cindy Thompson in an alcoholic rage after she refused to abort a child that he did not want." We review for an abuse of discretion a trial court's ruling whether to admit evidence. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs when a trial court's determination falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo whether a trial court's evidentiary rulings implicate a defendant's right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

In a separate record documenting the excluded testimony, Clarke testified that in 1979, Davis "came into my mother's house looking for something and I had asked him what it was he was looking for and he got really volatile and hit me several times." Clarke estimated that Davis hit her 10 or 12 times, breaking a tooth and causing blood to appear in her eye. She believed that Davis had "explosive anger issues over things that didn't really require you to react that way. I mean, it would be really super strong reactions to something silly that might irritate you." Clarke alleged that Davis also suffered from alcohol-induced blackouts. The trial court excluded this testimony, ruling that it described events too remote in time to the murder. Defendant argues that this evidence supplied critical support for her claim that Davis murdered the victim, and that its exclusion denied her constitutionally protected right to present a defense.

The trial court viewed Clarke's testimony regarding Davis's character for rage and violence inadmissible under MRE 404(b), ruling that none of the exceptions to this rule applied. The trial court described the evidence as "really remote in time in terms of the period we're talking about[.]" Defendant's brief on appeal suggests no proper purpose for introducing Clarke's testimony under MRE 404(b)(1). The only exception that may potentially apply concerns Davis's "scheme, plan, or system in doing an act." But Clarke's beating at Davis's hands bears virtually no resemblance to the bludgeoning and stabbing of the victim. Because the incidents are somewhat remote in time and the beating of Clarke bears no factual similarities to the victim's murder, the events do not support a scheme, plan or system inference. Therefore, trial court did not err in excluding this evidence under MRE 404(b)(1).

Moreover, the exclusion of Clarke's testimony did not preclude defendant from introducing evidence regarding Davis's guilt. Throughout trial, defense counsel attempted to implicate Davis and others. The exclusion of Clarke's otherwise inadmissible testimony about Davis did not deprive defendant of a meaningful opportunity to present a complete defense. *Holmes v South Carolina*, 547 US 319, 324-327; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

V

Defendant contends that the trial court erroneously allowed the prosecution to elicit testimony that her silence during the taped conversation with Apker constituted evidence of her guilt, which error was compounded when the court permitted the prosecutor to then emphasize the contents of the recorded conversation during its closing argument. "The decision whether to admit evidence is within a trial court's discretion," and this Court thus will review a trial court's ultimate evidence admissibility ruling for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant challenges the admission of the following portion of Apker's tape-recorded conversation with her:

Apker: Do you remember when you guys called me and all this other shit, right?

Carol Deer: Mm-hmm.

Apker: Okay. Let me ask you this. When you know that Carol wanted me to—

Carol Deer: Mm-hmm.

Apker: —kill Cindy, right?

Carol Deer: Mm-hmm.

Tiffany Apker: (Unintelligible).

Apker: Did you use Tiffany—

Carol Deer: No.

Apker: Why did—Okay but let me ask you this. Then why did you send her my way?

Defendant moved to bar the admission of this exchange, contending that she had no involvement in the conversation between Apker and Deer. The trial court determined that the statement's admissibility would depend on the foundation laid at trial. Apker testified on a separate record that the conversation took place at a round table, and that Tiffany sat to Apker's immediate right, while defendant sat to his immediate left. Deer sat across the table from Apker. The trial court then permitted the prosecution to introduce the quoted segment of the tape, and to argue that defendant's silence during this conversation evidenced her guilt.

Our Supreme Court has approved as substantive evidence adoptive admissions "only when the statements are made to a party to be affected by them under circumstances from which … acquiescence in their truth can be fairly inferred if not expressed." *Dawson v Hall*, 2 Mich 390, 393 (1852). A defendant's silence in the presence of a statement by another does not allow a factfinder to impute the statement to the defendant in the absence of some additional conduct that tends to demonstrate the defendant's acquiescence. See *People v Courtney*, 178 Mich 137, 148-152; 144 NW 568 (1913). A tacit admission through silence "may not be used as substantive evidence of a defendant's guilt," and "is not probative evidence of the truth of" another's statement. *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999), citing and reaffirming *People v Bigge*, 288 Mich 417, 420; 285 NW 5 (1939).

In *People v Solmonson*, 261 Mich App 657, 666; 683 NW2d 761 (2004), this Court explained that the admissibility of a tacit admission under MRE 801(d)(2)(B) requires "a statement … which the party has manifested an adoption or belief in its truth." A "statement" is either an oral or written assertion, or nonverbal conduct of a person intended as an assertion. *Id*.; see also MRE 801(a). The defendant's silence in *Solmonson* did not constitute an adoptive admission because no evidence existed of "oral, written or nonverbal conduct intended as an assertion that defendant adopted as his own statement." *Id*. In *Solmonson*, *supra* at 666-667, this

Court distinguished between "a tacit admission requiring the adoption of a 'statement' and nonresponsive conduct as evidence of consciousness of guilt[.]" The consciousness of guilt conduct identified in *Solmonson* occurred after two sheriff's deputies found the defendant unconscious in the driver's seat of a car parked partially in the road, with an open can of beer between his legs. *Id*. at 660. The deputies awakened the defendant, who then failed a sobriety test and stated, "This is bullshit," and expressed acquiescence regarding a trip to the jail. *Id*. This Court held that the trial court did not err by admitting testimony regarding the defendant's statements because the statements and his failure to deny having driven the car evidenced his consciousness of guilt. *Id*. at 667. "Accordingly, the prosecutor's argument based on this evidence was also proper." *Id*. at 660.

The "statements" involved here are Apker's questions to Deer as follows: "Do you remember when you guys called me and all this other shit, right?" and "Okay. Let me ask you this. When you know that Carol wanted me to—-kill Cindy, right?" Questions are not assertions because they are incapable of being judged true or false. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82, mod in part on other grounds 458 Mich 862 (1998). "Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay." *United States v Thomas*, 451 F3d 543, 548 (CA 8, 2006). Thus, defendant's silence in the face of Apker's questions does not qualify as an adoptive admission.

Nor does defendant's silence amount to consciousness of her guilt, even assuming that Apker directed his questions to defendant as well as to Deer. Silence alone does not give rise to consciousness of guilt. In *Solmonson*, this Court emphasized that the defendant's statements combined with his failure to deny having driven the vehicle supplied evidence of his consciousness of guilt. In contrast, defendant here exhibited no affirmative conduct reflecting consciousness of guilt, and in no manner manifested interest in Apker's questions, or even that she understood what he was talking about. Because defendant's silence did not constitute evidence of her consciousness of guilt, the trial court erred by permitting the prosecutor to make this argument.[6] See *Hackett*, *supra* at 213 ("*Bigge* precludes the admission of a defendant's silence in the face of accusation as substantive evidence of his guilt," although a "defendant's prearrest silence is admissible for impeachment purposes.").

The alleged error in this case—the trial court's decision to permit the prosecutor to argue that defendant's silence in the face of Apker's questions constituted substantive evidence of her guilt—is a preserved nonconstitutional error. Whether preserved nonconstitutional error is harmless depends on the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). The error is presumed harmless, and the defendant bears the burden of demonstrating that it resulted in a miscarriage of justice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "In order to overcome the presumption that a preserved nonconstitutional error is

[6] In rebuttal, the prosecution argued that "[i]f somebody said that while you were sitting there—you know that time that . . . she or he wanted me to kill, you'd say, what are you talking about, I never asked you to kill anybody. And she's sitting right there. This is something if you heard you would deny it if it was not true. And she doesn't."

harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative," i.e., that "it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

Although all the evidence amassed against defendant in this case was circumstantial, we cannot conclude that the prosecutor's improper argument more probably than not affected the outcome of the trial. In her brief, defendant argues that "a jury looking for evidence of guilt would have seized on the suggestion that Ms. Ege adopted as her own Tim Apker's statement that she actively sought his help in killing Cindy Thompson and that her very failure to speak up in the restaurant was evidence of her consciousness of her own guilt." But other evidence showed that defendant solicited a killer, and ultimately the jury convicted defendant of having killed the victim, not of soliciting the victim's murder or aiding and abetting in its commission. In conclusion, the improper references to defendant's silence did not undermine the reliability of the verdict.

VI

Defendant lastly claims that the trial court erroneously permitted the prosecution to introduce Mallett's testimony regarding the knife with the bent tip because the medical examiner testified that "any common kitchen knife" could have caused the victim's stab wounds, and the prosecution never directly linked the knife produced by Mallett to the injuries on the victim's body. Defendant further characterizes Mallett's testimony that defendant had neglected to remove blood, hair and gristle from the knife before packing it in a box as "intrinsically absurd and therefore unreliable." In defendant's estimation, this evidence lacked any tendency to make more or less probable the existence of a fact of consequence to the action, and should have been excluded under MRE 401 and 403.

Once again, we review for an abuse of discretion a trial court's ruling whether to admit evidence. *Bauder*, *supra* at 179. We review de novo whether a court rule or statute precludes the admission of evidence. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

In *People v Mitchell*, 37 Mich App 351, 357; 194 NW2d 514 (1971), this Court described as follows the necessary foundation for the introduction of weapons purportedly used to commit a crime:

> To justify their admission, a proper foundation must be laid, and such articles must be identified as the articles they are purported to be, and shown to be connected with the crime or with accused; however, such identification is not required to be positive, absolute, certain, or wholly unqualified, and where there is some evidence for this purpose, objections to its sufficiency go to the weight rather than to the admissibility of the articles in question.

Mallett testified that he found the knife in a box that defendant and her friends had packed. Mallett denied packing any boxes containing defendant's things. This testimony adequately connected the knife with defendant, and the jury had the option to believe or disbelieve it.

In *Mitchell*, this Court quoted approvingly from 22A CJS, Criminal Law, § 712, pp 961-963, regarding the quantum of evidence necessary to link an alleged weapon with a crime:

> To warrant the admission in evidence of an instrument or weapon as the one with which the crime was committed, a prima facie showing of identity and connection with the crime is necessary and sufficient; clear, certain and positive proof, or positive identification, is generally not required. Objections to the lack of positive identification, or to the sufficiency of the evidence identifying the article in question or connecting it with accused or with the crime, such as the objection that a considerable length of time elapsed after the crime before the weapon or instrument was found, or that in the interval third persons may have had access thereto, or that it was tampered with, go to the weight, or probative force, of the evidence rather than to the admissibility of the article.

Dr. Dragovic's testimony adequately connected the knife with the victim's murder. Dragovic testified that one of the stab wounds on the victim's neck penetrated the intravertebral space and injured the upper cervical spinal cord. To cause the wound, the knife had to "push its way through … bony structures," and its tip could have become bent during this process. Dragovic expressed that the bent tip of the knife in evidence appeared consistent with "deflection off the vertebrae." This testimony sufficiently connected the knife to the victim's murder. *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989) ("Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense.").

Despite the inherent weaknesses in Mallett's testimony, the trial court properly concluded that any danger of unfair prejudice, confusion of the issues, or misleading the jury inherent in the knife's admission did not substantially outweigh the probative value of the evidence. MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). Defendant's possession of a knife that could have been used to kill the victim was strongly probative of defendant's guilt. The considerable length of time that elapsed between the victim's murder and Mallett's discovery of the knife pertained to the weight of the knife evidence, not its admissibility. Thus, it fell within the jury's province to decide whether to believe that defendant actually used the knife to commit the crime, considering the inherent weaknesses in Mallett's testimony.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher