S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2005
v MICHAEL DARNELL HARRIS, Defendant-Appellant.	No. 248247 Washtenaw Circuit Court LC No. 01-002001-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MICHAEL DARNELL HARRIS, a/k/a MALCOLM HAKEEM ABDUL ALI, a/k/a MICHAEL STIGGLES, Defendant-Appellant.	No. 253337 Washtenaw Circuit Court LC No. 01-002003-FC

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

In Docket No. 248247, defendant was charged in December 2001 with three counts of first-degree murder, (1) felony murder committed in the course of a breaking and entering, MCL 750.316(1)(b), (2) felony murder committed while perpetrating first-degree criminal sexual conduct (CSC I), and (3) premeditated murder, MCL 750.316(1)(a), arising from the September 1982 death of Margorie Upson.[1] After a jury trial, defendant was convicted of one count of first-degree premeditated murder, and one count of first-degree felony murder "committed while in

[1] Pursuant to a circuit court order, the prosecutor filed an amended information on December 20, 2002, that charged defendant with two counts in Upson's murder: felony murder committed either during a breaking and entering or the commission of CSC I, and premeditated murder.

the perpetration or attempted perpetration of both breaking and entering of a dwelling with intent to commit criminal sexual conduct in the third degree or larceny and criminal sexual conduct in the third degree." The circuit court sentenced defendant to one term of life imprisonment without parole for a single first-degree murder conviction, supported by two alternate theories.

In Docket No. 253337, defendant also was charged in December 2001 with two counts of first-degree felony murder and one count of first-degree premeditated murder arising from the late September 1982 or early October 1982 death of Louise Koebnick. After a separate jury trial, defendant was convicted of one count of first-degree premeditated murder and one count of first-degree felony murder. The circuit court sentenced defendant to a term of life imprisonment without parole for one first-degree murder conviction supported by two alternate theories.[2]

Defendant appeals of right from his convictions in both cases, which were consolidated by this Court, and we affirm in both cases.

I

The evidence introduced during defendant's trials showed that within several days in late September 1982 and October 1, 1982, eighty-five year-old Upson, a resident of Ypsilanti, and eighty-five year-old Koebnick, who resided in Ann Arbor, were murdered in their homes. Both women, who had lived alone for many years after the deaths of their husbands, and who had remained active by engaging in activities like gardening, walking to neighborhood destinations, and performing some outdoor maintenance activities, were beaten, raped, and strangled.

During defendant's February 2003[3] trial for murdering Upson, the prosecutor introduced evidence concerning the Koebnick's murder, and during defendant's November 2003 trial for killing Koebnick, the prosecutor introduced evidence regarding Upson's murder. The prosecutor also introduced during both trials evidence regarding the early January 1982 killing of ninety-one year-old Florence Bell, who had lived in Ypsilanti. Bell, who also had lived alone for many years and kept active by walking and gardening, was found dead in the parlor of her house, lying on the floor with her legs spread apart; someone had forcefully cut Bell's throat, and Bell also had suffered blunt force trauma and several broken ribs. The prosecutor linked defendant to all three murders through the testimony of forensic scientists at the Michigan State Police crime laboratory, who performed DNA testing on various items from the Upson, Koebnick and Bell murder scenes, and matched the DNA profile of sperm found on objects from each murder scene with the DNA profile of defendant.

---

[2] According to a Department of Corrections offender profile of defendant, at the time of his trials, he was serving two terms of life imprisonment for two convictions of second-degree murder in Ingham County with which he was charged in 1983, as well as a sixty to ninety year prison term for a Jackson County assault with which he was charged in late 1982.

[3] Although by late 1982 the police suspected defendant as the murderer of Upson, Koebnick and Bell, they could not closely link him to the crimes through eyewitness testimony or fingerprint identification. The cases were revisited in the late 1990s, when police and forensic experts believed that scientific advances would permit successful testing of the many items of physical evidence that still existed from the murder scenes.

II

In Docket No. 248247, defendant first contends that the circuit court erred by denying his pretrial motion in limine that sought suppression of evidence relating to the murders of Koebnick and Bell, and a pornographic magazine entitled "Over 50" that the police seized during a search of defendant's prison cell on January 18, 2001. This Court reviews a circuit court's decision whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

A

Defendant asserts that the magazine was irrelevant, that the unfair prejudice from its admission was not outweighed by its probative value, and that its admission violated MRE 404(b). MRE 404(b)(1)[4] prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But evidence of a defendant's other acts or crimes qualifies as admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's motive for committing a charged crime, or his scheme, plan or system in doing an act; (2) the other acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr*, *supra* at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In support of the people's request to admit the "Over 50" pornographic magazine, the prosecutor offered noncharacter reasons under MRE 404(b)(1), specifically to prove defendant's identity as the killer of Upson, Bell and Koebnick, and to establish defendant's motive for attacking them. The evidence that defendant possessed under his bunk pillow the "Over 50" pornographic magazine, which depicted some women well beyond fifty years of age,[5] tends to

---

[4] According to MRE 404(b)(1),

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[5] The transcripts of the Upson murder trial in Docket No. 248247 do not contain the portion of the trial during which the prosecutor introduced the "Over 50" magazine into evidence. In the transcripts of the Koebnick murder trial, the magazine was admitted during the testimony of Ann Arbor police Detective-Lieutenant Michael Zsenyuk, who participated in the search of

(continued…)

show that defendant had a sexual interest in elderly women. Defendant's sexual interest in the elderly has some probative force toward explaining his potential motivation for the invasion of their residences and the sexual assault. The probative value of evidence regarding defendant's motive for committing the sexual assaults was heightened by the fact that defendant challenged his identity as the assailant at both trials. *People v Fisher*, 449 Mich 441, 450, 453; 537 NW2d 577 (1995) (observing that in cases in which the proofs are circumstantial and the only witness is the accused, evidence of motive is highly relevant).[6]

Despite defendant's complaint on appeal that the "Over 50" magazine simply smeared his character, we detect no danger of unfair prejudice in the form of jury bias, sympathy, anger or shock inherent in the evidence that would substantially outweigh its significant probative value. MRE 403; *Fisher*, *supra* at 452-453; *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). Further, the circuit court read each jury a cautionary instruction against drawing any bad character inferences on the basis of defendant's alleged commission of other improper acts or crimes. We conclude that any unfair prejudice arising from the admission of the "Over 50" magazine did not substantially outweigh its probative value in tending to establish defendant's motive for selecting and attacking his elderly victims, MRE 403, and that the circuit court did not abuse its discretion by admitting the pornographic magazine at defendant's trials.

B

Defendant further asserts that it was error to permit the prosecutor's introduction in each of the two trials of evidence concerning the two other 1982 murders, one purpose for which the prosecutor offered the evidence was to establish defendant's identity as the murderer in each of the charged crimes by showing his modus operandi in committing the other two murders. We disagree. When a prosecutor offers similar act evidence to identify a defendant as the perpetrator of a crime by means of a particular modus operandi, Michigan courts continue to analyze the admissibility of the similar act evidence pursuant to the test set forth by the Michigan Supreme Court in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982); *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). Four elements must be satisfied to support the introduction of similar act evidence to prove identity through modus operandi: (1) substantial

(…continued)

defendant's prison cell on January 18, 2001. Although the Upson murder trial transcripts reflect that Zsenyuk also testified there and that his testimony "was previously transcribed by another reporter" in a separate transcript, our review of the record revealed no transcription of Zsenyuk's testimony. In his testimony at the Koebnick murder trial regarding the contents of the "Over 50" magazine, Zsenyuk indicated that he had leafed through the magazine, which contained an article entitled "Eighty-five and still horny for sex."

[6] To the extent that defendant suggests that the "Over 50" magazine did not depict violence and showcased mostly women in their fifties, these facts do not render the magazine inadmissible, but affect the weight of the motive evidence, and, indeed, make its admission less prejudicial. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (explaining that if evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences, and that "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences").

evidence must exist showing that the defendant in fact committed the proffered similar act, (2) some special circumstance or quality of the proffered similar act must tend "to prove the defendant's identity, or . . . scheme, plan or system in doing the act . . . [or] opportunity, preparation, [or] knowledge," (3) the similar act evidence tends to prove defendant's guilt of the charged offense, and (4) admission of the similar act evidence satisfies the balancing inquiry within MRE 403. *Golochowicz*, *supra* at 309; *Ho*, *supra* at 186.

The testimony by the several forensic scientists that defendant's DNA profile matched the male genetic profile obtained from items of evidence recovered from each of the Upson, Koebnick and Bell murder scenes, with the likelihood of a random match amounting to one in 294.7 trillion Caucasians, one in 3.3 trillion African-Americans,[7] and one in 289.5 trillion Hispanic-Americans, constitutes substantial evidence that defendant in fact committed the two other similar murders that the prosecutor offered into evidence during his trials for the Upson and Koebnick murders. *Golochowicz*, *supra* at 309; *Ho*, *supra* at 186.

Further, facts concerning the 1982 murders of Bell, Upson and Koebnick combine to demonstrate special qualities or circumstances that tend to prove defendant's scheme, plan or system in committing the murders. *Golochowicz*, *supra* at 309; *Ho*, *supra* at 186. The victims all were in their mid eighties or nineties in age, lived alone, and remained active at the times of their deaths, including by tending to various outdoor tasks like gardening and by walking to different places in their neighborhoods. Upson lived on the same Ypsilanti block where a Greyhound bus station was located, Bell lived within five or six blocks of Upson, and Koebnick lived in neighboring Ann Arbor.[8] Upson's assailant and Bell's assailant broke into their homes, and although the trial testimony did not specifically describe any visible remnants of a breaking and entering into Koebnick's house, her family testified that she never would have let a stranger inside. The assailant of Upson, Koebnick and Bell (1) struggled with and injured each of the victims by applying blunt force, (2) forcefully penetrated and caused bruising and other injuries in Upson's and Koebnick's vaginal areas, and although he apparently did not penetrate Bell because she was wearing a pessary[9] inside her vagina, he left his semen at each of the three crime scenes, (3) strangled Upson and Koebnick with nylon stockings, and inflicted a deep slit in Bell's throat, before covering the victims to varying degrees and leaving their bodies partially

---

[7] Defendant is African-American.

[8] Before the murders defendant had lived in both Ann Arbor and Ypsilanti, and had possibly traveled to the Greyhound bus station in Ypsilanti for the purpose of visiting his daughter, who lived in Belleville with her mother.

[9] Forensic pathologist Michael Caplan testified that during Bell's autopsy, it was observed that she had uterine prolapse, or relaxation of pelvic floor muscles that "causes the uterus to move . . . into the area of the vagina so that the cervix and the uterus keep[] moving forward." In treatment of this condition, she wore in her vagina a pessary, which Caplan described as a plastic or rubber object that "distends the vagina . . . , elevates the cervix . . . and prevents the uterus from prolapsing into the vagina." Caplan believed that the pessary could have hampered vaginal penetration by another object, but explained that semen still could exist on swabs of Bell's vagina if her assailant had ejaculated close to her vaginal opening, or deposited semen on her inner thighs, which gravity then pulled toward her vaginal opening.

unclothed or with their clothing in disarray, and lying on their backs with their legs spread apart. At some point, the assailant in each case emptied the victims' wallets or purses on their beds, and left most of the areas of the victims' residences undisturbed.

The evidence of the similarities between defendant's commission of the Koebnick and Bell murders and the murder of Upson was strongly probative of defendant's identity as Upson's murderer, the issue centrally disputed by defendant at trial. *Golochowicz*, *supra* at 309; *Ho*, *supra* at 186. Pursuant to the same logic, the significant similarities between defendant's murders of Upson and Bell and his murder of Koebnick strongly tended to prove his identity as Koebnick's killer, the centrally contested issue during the second trial. Given the high probative value of the evidence of the other murders toward proving defendant's identity as the murderer, the centrally contested question at each of his trials, and defendant's failure to identify any specific and significant unfair prejudice inherent in the admission of the similar act evidence, we conclude that the circuit court did not abuse its discretion in admitting the similar acts evidence under MRE 403. *Ho*, *supra* at 187.

III

We also reject defendant's next argument in both Docket No. 248247 and Docket No. 253337 that the circuit court should have suppressed the "Over 50" magazine because the police violated MCL 780.652 when they seized the magazine and other documents from his prison cell. Defendant essentially argues that the magazine and various other papers were wrongfully seized because they were not evidence of any crime.

Defendant relies on MCL 780.652, which authorizes the issuance of a search warrant for, among other things, "[e]vidence of crime or criminal conduct on the part of any person," and "[c]ontraband." But even assuming as defendant maintains that none of the seized documents qualifies as evidence of crime as required by MCL 780.652(d),[10] and that the police therefore

[10] According to the circuit court's summary of the affidavit Zsenyuk provided in support of the warrant to search defendant's cell on January 18, 2001, the "Over 50" magazine and the police and forensic reports and court documents pertaining to defendant's past sexual assaults against elderly women all qualify as evidence of crime pursuant to MCL 780.652(d). The circuit court summarized the following relevant allegations that Zsenyuk set forth in support of the search warrant:

> The warrant was supported by an affidavit signed by Lt. Zsenyuk indicating that preliminary DNA testing of a sample of defendant's blood drawn during his prosecution for homicide in Ingham County and Criminal sexual conduct in Jackson County matched biological evidence collected from the crime scenes of two of the murders with which defendant is charged.
>
> The affidavit also stated that Lt. Zsenyuk had consulted FBI Supervisory Special Agent James J. McNamara, a Criminal Investigations Analyst for the National Center for the Analysis of Violent Crime, regarding the behavioral characteristics and investigation of serial sexual offenders. Lt. Zsenyuk obtained the following information: to be classified as a serial sexual offender, an

(continued…)

abused their authority in seizing these items during the search of his prison cell, this does not provide a basis for suppression of the "Over 50" magazine, the only seized item that the prosecutor introduced at defendant's trials. Although defendant suggests that exclusion must occur because the prosecution "lost jurisdiction" over the property by violating MCL 780.652, nowhere within the plain language of MCL 780.652 does the statute suggest that the Legislature contemplated the exclusion of items seized in violation of the section. See *People v Stevens (After Remand)*, 460 Mich 626, 643-644; 597 NW2d 53 (1999) (holding the exclusionary rule inapplicable to an asserted violation of MCL 780.656 because nothing within the language of the statute alluded to the exclusionary rule as a valid remedy for a statutory violation). Concerning MCL 780.657, which defendant also invokes in his brief, the Michigan Supreme Court has observed that instead of creating an exclusionary rule provision within the statutory search warrant sections, the Legislature included section 7, which contemplates a fine of up to $1,000 or imprisonment up to one year, as the only statutory penalty "for someone who exceeds or exercises authority unnecessarily when executing a search warrant." *Stevens*, *supra* at 644.

IV

In his briefs on appeal in both Docket No. 248247 and Docket No. 253337, defendant additionally raises several allegations of error related to his preliminary examination on separately filed charges that he killed Upson, Koebnick and Bell, which charges the district court consolidated for purposes of the examination. The manner in which a preliminary examination is conducted generally falls within the sound discretion of the district judge or magistrate that conducts it. *People v Gaines*, 53 Mich App 443, 447; 220 NW2d 76 (1974); *People v East*

(…continued)

> individual must have been involved in at least three sexual offenses; serial sexual offenders share common behaviors, including keeping material written about his crime(s), items taken from the victim and any planning materials such as maps or schedules, all of which are used to enhance the offender's sexual fantasy; and materials a serial sexual offender uses to enhance his sexual fantasy must be in an area readily accessible to him.
>
> Lt. Zsenyuk also indicated in the affidavit that defendant had been identified as the offender in five prior sexual assaults and therefore fit the classification of serial sexual offender; and that because he resided in a prison cell, any materials he used for sexual fantasy would most likely be discovered in his cell.

We cannot conclude that the circuit court clearly erred by finding that the "Over 50" pornography magazine and the many other papers, which according to the court consisted of "transcripts reports and legal documents . . . related to earlier prosecutions against defendant for sexual offenses" and "contained graphic accounts of the crime scenes of the sexual assaults and homicides of elderly women," constituted "potential evidence of the subject crimes [as required by MCL 780.652(d)] because they are consistent with defendant's being a serial sexual offender with a pattern of attacking elderly women." *People v Wilson*, 257 Mich App 337, 351; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004). Moreover, as discussed above in section II, the "Over 50" magazine amounted to probative evidence of crime in each case, specifically defendant's motive for attacking Upson, Koebnick and Bell.

Lansing Municipal Judge, 42 Mich App 32, 37-38; 201 NW2d 318 (1972).

A

Defendant first asserts that the district court improperly consolidated the three separate murder charges into the same examination hearing. Statutory provisions and court rules govern the conduct of preliminary examinations. MCL 766.4; MCR 6.110. Nothing within MCL 766.4, or the court rules, or elsewhere, restricts the district court's or magistrate's discretion with respect to its procedural handling of the preliminary examination. See *East Lansing Municipal Judge*, *supra* at 39. Further, defendant directs this Court to no authority for the proposition that any Michigan court rule or statute, or federal or Michigan constitutional provision, precluded the district court from consolidating the three preliminary examinations regarding the deaths of Upson, Koebnick and Bell. *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001).

Even assuming that such authority existed, defendant nonetheless fails to demonstrate that the district court's consolidation of the preliminary examinations affected the fair and impartial nature of the examination. Defendant points to no concrete and specific prejudice arising from the consolidation that improperly influenced the district court's decision to bind him over on the charges in all three cases, and offers only speculation that the district court may have operated under some unidentified handicap in denying his motion to dismiss all charges premised on speedy arrest violations. MCL 769.26; MCR 2.163(A).

Although defendant suggests that the district court probably considered inappropriately some evidence concerning the related cases in making the probable cause determinations in each individual case, (1) defendant identifies no specific evidence that the district court might have improperly considered, and (2) this Court has recognized that when a court occupies the position of fact finder in a proceeding, any evidentiary error presumably qualifies as harmless. To the extent that defendant expresses concern regarding the sufficiency of proper evidence supporting the district court's findings of probable cause to bind defendant over in each of the three cases, "any error in the sufficiency of the proofs at the preliminary examination is considered harmless" where the jury's verdicts are supported by the evidence presented at trial. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001), citing *People v Hall*, 435 Mich App 599, 600-601; 460 NW2d 520 (1990). Although defendant suggests in subsequent issues that insufficient evidence supported his convictions of the murders of Upson and Koebnick, as we discuss in section VIII, *infra*, his claims lack merit.

B

Defendant next maintains that his district court counsel was ineffective for failing to object to the prosecutor's introduction of written DNA reports during the examination, instead of calling the forensic experts as live witnesses. To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The prosecutor properly admitted the reports pursuant to MCL 600.2167(1), which expressly authorizes a prosecutor to introduce at a preliminary examination "a report of the findings of a technician of the division of the department of state police concerned with forensic science, signed by that technician . . . in place of the technician's appearance and testimony." Defense counsel need not have lodged a meritless objection to the prosecutor's introduction of the written reports. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Even assuming that defense counsel unreasonably failed to timely request pursuant to MCL 600.2197(4) that the prosecutor present the forensic experts to testify at defendant's preliminary examinations, the error did not prejudice defendant. *Rodgers*, *supra* at 714. Although defendant asserts an entitlement to have cross-examined the authors of the DNA reports at the preliminary examination, presumably to attack the weight their conclusions contributed toward the prosecutor's showing of probable cause that defendant committed the charged murders, we reiterate that "any error in the sufficiency of the proofs at the preliminary examination is considered harmless" where the jury's verdicts are supported by the evidence presented at trial. *Moorer*, *supra* at 682. As discussed in section VIII, *infra*, sufficient evidence at trial supported defendant's convictions of the murders of Upson and Koebnick.[11]

C

Defendant further asserts that the district court erred by denying his request to present defense witnesses during the consolidated preliminary examination. During the examination, defendant expressed his desire to call witnesses on his behalf who would substantiate the false and unreliable nature of the DNA reports proffered by the prosecutor, and the prosecutor's lack of good faith in waiting twenty years to file murder charges against him. In support of his claim, defendant asserted his Sixth Amendment right to confront the witnesses against him, but did not mention his Sixth Amendment right to compulsory process, which he raises on appeal. Consequently, this issue is unpreserved for appellate review. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). This Court reviews unpreserved claims of constitutional error only for plain error that affected the defendant's substantial rights. *People v Geno*, 261 Mich App 624, 626-627; 683 NW2d 687 (2004).

Defendant fails to identify in his brief any specific witnesses that the district court should have permitted him to call, or to explain the substance of any allegedly improperly precluded witness' testimony, and offers no authority supporting his contention that his inability to call witnesses during his examination violated his Sixth Amendment right to compulsory process. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004); *Harmon*, *supra* at 533.

[11] Defendant offers no authority in support of the notion that in the context of a preliminary examination that the Michigan Legislature created by statute and that neither the United States nor Michigan constitutions require, MCL 600.2197(1) might violate his Sixth Amendment right to confront the witnesses against him, and defendant fails to develop or explain in any detail his assertion that the admission of the reports violated the Sixth Amendment. *Harmon*, *supra* at 533.

Defendant also fails to establish that his inability to call witnesses prejudiced him in any fashion, either at the preliminary examinations or at trial.

Defendant repeatedly voiced before the district court that his goal in calling many desired witnesses, who would counter the soundness of the DNA reports and substantiate bad faith by the prosecutor in neglecting to timely pursue charges, was "to challenge the issue of probable cause," "to challenge the prosecutor's request for a bind-over." Once again, "any error in the sufficiency of the proofs at the preliminary examinations is considered harmless" where the jury's verdicts are supported by the evidence presented at trial. *Moorer*, *supra* at 682. As discussed in section VIII, *infra*, sufficient evidence at each trial supported defendant's convictions of the murders of Upson and Koebnick.

V

Defendant further contends in Docket No. 248247 that the prosecutor infringed on his protection against double jeopardy by charging him with two murders arising from the death of one victim, Upson.[12] This Court reviews de novo questions of constitutional law involving double jeopardy. *People v Rodriguez*, 251 Mich App 10, 17; 650 NW2d 96 (2002).

Defendant correctly asserts that the prosecutor committed error by charging him with two discrete counts of murder arising from the death of an individual victim. *Herndon*, *supra* at 392. This Court has recognized that convictions of both first-degree felony murder and first-degree premeditated murder arising from the death of one victim violate double jeopardy principles, and that in such circumstances "the appropriate remedy to protect defendant's rights against double jeopardy is to modify defendant's judgment of sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

Our review of the record reflects that the circuit court expressly recognized at the time of sentencing in each case the impropriety of imposing two separate convictions and sentences for the murder of one victim. In the Upson case, the circuit court entered a judgment of sentence reflecting that the premeditated murder count (Count 2) was merged into the same count as the felony-murder conviction (Count 1), with one resulting term of imprisonment, and in the Koebnick case, the court entered a judgment of sentence for only a single count of first-degree murder supported by multiple theories, with one resultant term of imprisonment. Under these

[12] The initial informations in the Upson case (LC #01-002001-FC) and the Koebnick case (LC #01-002003-FC), filed on May 15, 2002, both charged defendant with three distinct counts of murder: (1) first-degree felony murder committed in the course of a breaking and entering, (2) first-degree felony murder committed during a CSC I, and (3) first-degree premeditated murder. On December 24, 2002, the prosecutor filed in each case an amended information that charged defendant with two counts of murder arising from each victim's death: (1) first-degree felony murder committed during a breaking and entering or CSC I; and (2) first-degree premeditated murder. In each case, the circuit court instructed the jury with respect to the two separate counts of murder within the amended informations, and the jury found defendant guilty of both counts in each case.

circumstances, we find that no double jeopardy violation exists that entitles defendant to relief. *Herndon*, *supra* at 392 (concluding that the prosecutor's excessive charging of the defendant did not require reversal of the ultimate conviction because the judgment of sentence reflected that the defendant actually was sentenced only for one murder conviction, "which is all that is necessary to protect his rights").

VI

Defendant next argues that the prosecutor violated his Sixth Amendment right of confrontation when he failed to call as a witness Charlotte Day, a retired crime scene technician who allegedly collected semen-encrusted pubic hairs from Upson's body at the scene of her murder. This issue is unpreserved because we located nowhere in the record that defendant invoked his Sixth Amendment right to confront Day, or asked for assistance in securing Day's testimony. We will consider this unpreserved constitutional claim for the first time on appeal only if an error occurred, it was plain, and it affected defendant's substantial rights. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

The only witness lists of the prosecutor contained within the record of the Upson case include an original "Notice of additional witnesses prosecuting attorney intends to produce at trial and . . . not to product [sic] at trial" filed on August 22, 2002, and an amended notice filed on January 2, 2003, neither of which mentions Day. Defendant filed no notice of his intent to call Day as a witness, and neither the prosecutor nor defendant ultimately called Day to testify. This Court has recognized repeatedly that under circumstances such as these, no violation of the Sixth Amendment right to confront witnesses exists:

> The defendant has a constitutional right to be confronted with the witnesses against him. However, defendant does not claim that he was denied the right to confront witnesses whose testimony in some form was considered by the jury. Instead, defendant claims that various individuals should have been called to testify in the second trial. Defendant does not explain why he was unable to call these individuals on his own. Thus, there has been no violation of defendant's right to confrontation or due process. While the prosecutor has certain obligations with respect to witnesses, it is not the prosecutor's responsibility to call any witness whom the defendant believes may support his defense in some way. [*People v Lee*, 212 Mich App 228, 257-258; 537 NW2d 233 (1995).]

See also *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999). We conclude that defendant's Sixth Amendment right of confrontation claim lacks merit. Further, it is pure speculation that Day would have provided testimony helpful to the defense.

VII

In Docket No. 248247 and Docket No. 253337, defendant alleges that the prosecutor violated his due process entitlement to a speedy arrest by waiting until December 2001 to charge him with the 1982 murders of Upson and Koebnick. This Court reviews for an abuse of discretion a trial court's decision concerning a motion to dismiss premised on prearrest delay. *Herndon*, *supra* at 389. To the extent that this claim of prearrest delay implicates defendant's constitutional due process rights, we review de novo such constitutional questions. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); *People v Cain*, 238 Mich App 95, 108;

605 NW2d 28 (1999).

The federal "'Due Process Clause plays a limited role in preventing unjustified preindictment or prearrest delay.'" *Cain*, *supra* at 109, quoting *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). The mere occurrence of delay between the commission of a crime and the defendant's arrest for it does not amount to a denial of due process. *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979). "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *Crear*, *supra* at 166. The defendant bears the burden to "come forward with evidence of prejudice resulting from the delay while the prosecutor has the burden of persuading the reviewing court that the delay was not deliberate and did not prejudice the defendant." *Cain*, *supra* at 108.

We find that defendant has failed to satisfy his initial burden to demonstrate that the years of prearrest delay in these cases actually and substantially prejudiced his right to fair trials. "To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected." *Crear*, *supra* at 166. In his briefs on appeal, defendant asserts that the many years of delay prevented him from having the ability to raise an alibi defense during his trials, but defendant fails to suggest any specific alibi, or evidence that would have supported his claim of alibi, that the prearrest delay somehow precluded him from developing or introducing.[13] *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998) (explaining that the defendant must submit more than generalized allegations to show actual and substantial prejudice, and that nonspecific allegations of prejudice arising from alleged imperfections in witness' memory are generally insufficient).

With respect to defendant's complaint that because of the delay he could not locate former students Eric Jackson and Darnell Jones, who in September and October 1982 attended the Bach Elementary School located across the street from Koebnick's house, defendant successfully introduced during both the trials testimony and other evidence that in 1982 these students advised the police that they had seen a Caucasian man with a motorcycle enter Koebnick's house around the time of her murder. Because the jury considered the statements containing the recollections of Jackson and Jones that defendant purportedly hoped to introduce through their testimony during his trials, we cannot conclude that defendant's inability to call Jackson and Jones as witnesses actually prejudiced him, or meaningfully impaired "his ability to defend against the charges against him in such a manner that the outcome of the proceedings . . . likely [was] affected." *Crear*, *supra* at 166.[14]

---

[13] Defendant elicited testimony indicating that he was aware by at least 1983 or 1984 that he had become a suspect in the 1982 murders of Upson, Koebnick and Bell.

[14] Even assuming that the prearrest delay in this case actually and substantially prejudiced defendant in some respect, our review of the records reveals no evidence suggesting that the prosecutor delayed charging defendant because he hoped to gain a tactical advantage. Although defendant's briefs on appeal opine that the prosecutor's proffered excuse for the delay—that the police waited until the late 1990s when advanced DNA technology permitted them to arrange for testing of the trace evidence from the 1982 crime scenes—did not qualify as a good faith excuse

(continued…)

VIII

Defendant next argues in Docket No. 248247 and Docket No. 253337 that the circuit court should have granted his motions for directed verdicts of acquittal in each case because the prosecutor failed to adequately "produce, authenticate, or admit into evidence at trial, any DNA evidence, which was the chief and only claim of evidence against" him.

A

In reviewing a challenge to the sufficiency of the evidence, or the circuit court's denial of a motion for a directed verdict of acquittal, this Court considers all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable juror could find the defendant's guilt proven beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict; this Court should not interfere with the factfinder's role in determining witness credibility or the weight of the evidence. *Nowack*, *supra* at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

We initially observe that defendant disputes only that sufficient evidence tended to prove his identity as the assailant in each case, and that he does not contest other requisite elements of his felony murder and premeditated murder convictions. We conclude that when viewed in the light most favorable to the prosecution, the evidence introduced during each trial that (1) at nine different genetic locations, defendant's DNA profile matched, or was consistent with, the DNA profile found within semen located on (a) swabs of Upson's vagina, (b) Upson's semen-encrusted pubic hair, (c) Koebnick's corset, (d) scrapings from under Koebnick's right fingernails, and (e) swabs of Koebnick's vagina, and (2) the likelihood of a random match between defendant's DNA profile and the DNA profiles detected on these items of evidence amounted to one in 3.3 trillion African-Americans, the jury rationally found beyond a reasonable doubt that defendant committed the charged murders of Upson and Koebnick. *Riley*, *supra* at 139; *Nowack*, *supra* at 399-400.

B

Defendant attempts to avoid or nullify the highly probative DNA identification evidence by complaining that the prosecutor failed to introduce physical samples of the DNA evidence

(…continued)

for the delay, defendant's briefs do not allege any acts of deliberate delay by the prosecution or police intended to gain a tactical advantage. Moreover, the prosecutor amply showed that the prearrest delay in these cases occurred because of the need for further investigation, in light of the evidence indicating that (1) the police recovered no fingerprints from the 1982 murder scenes that matched defendant's, (2) the limitations of other forensic tools of early 1980s like blood typing evidence precluded specific identification of an assailant, and (3) only beginning in the mid 1990s did the state police crime lab begin DNA analysis utilizing the PCR/STR technique, which yielded results from much smaller quantities of genetic material than the amounts required to support earlier testing techniques. *Adams*, *supra* at 144 (rejecting a claim of improper prearrest delay because investigative rather than tactical concerns governed the prosecution's course of action).

and other physical evidence like his blood samples, and that an insufficient showing of authentication or chain of custody established that the DNA experts in fact tested evidence from the three murder scenes. After carefully reviewing the lengthy trial records, we conclude that the testimony adequately establishes in each case that the forensic experts performed analysis of and gained results regarding, various items of physical evidence that incriminated defendant in the charged crimes.

1

With respect to the evidence recovered in the Upson case, on which the state police crime lab ultimately performed DNA analysis linking defendant to Upson's murder, former Ypsilanti police sergeant Michael John Vincent testified that on September 29, 1982, he arrived first at Upson's residence and secured it until evidence technicians arrived from the state police crime lab. According to (1) the testimony of Charles Barna, a forensic scientist and supervisor of the DNA unit at the Michigan State Police crime laboratory, and who in 1982 was an evidence technician at the murder scenes of Bell and Koebnick, and (2) Ypsilanti police sergeant Amy Walker's description of police reports that she prepared, retired state police crime scene technician Day went to Upson's house on September 29, 1982, collected from Upson's body a sample of her encrusted pubic hair, and on the same day delivered the hairs to Barna.[15] Barna's forensic testing of the item confirmed the presence of semen. Barna and Walker believed that the state police crime lab had preserved the semen-encrusted hair (L-7), as well as vaginal swabs from Upson's autopsy, since September 29, 1982 and September 30, 1982, respectively.

Concerning the vaginal swabs, retired Michigan State Police Detective-Lieutenant Jon Stanton and Dr. Jean Freitag, who in 1982 participated in a forensic pathology residency with medical examiner Dr. Robert Hendrix, testified that they attended Upson's autopsy on September 30, 1982, and that at the autopsy Dr. Hendrix collected evidence including pubic hairs of Upson encrusted in a dried, white substance, air-dried vaginal swabs (L-15), and a blood sample from Upson, all of which Stanton delivered, in packaging marked with a unique case number, directly to Barna at the Michigan State Police crime lab for serological analysis. Barna testified that he analyzed the vaginal swabs of Upson, on which he detected A and H type substances.[16]

Walker averred that in the late 1990s, she arranged for the submission to the state police crime lab of several items related to Upson's murder, including semen-encrusted pubic hairs of Upson (L-7), and vaginal swabs of Upson (366[3].00D). Jeffrey Nye, a forensic scientist who worked in the biology subunit of the state police crime lab, testified that in October 2000, Barna

[15] Defendant offered no objection to Barna's and Walker's testimony that Day had collected the semen-encrusted pubic hair. Defendant in fact elicited this fact from Barna, and specifically cross-examined Barna with respect to the fact that Day brought to him for serological testing on September 29, 1982 several encrusted pubic hairs of Upson that Day collected at 309 West Cross.

[16] Barna explained that individuals having type O blood, like defendant, could produce type H substances, while only individuals having type A blood, like Upson, could produce type A substances. Barna further explained that some bacteria, including bacteria located inside the vagina, could produce substances that mimicked A substances.

placed in a particular refrigerator at the state police crime lab, and Nye retrieved for DNA testing, several cryovials containing items related to Upson's murder (lab case number 13514-82), including a vial containing semen-encrusted pubic hairs (L-7), which were labeled, dated 9/29/82, and initialed by Barna, and a vial containing two vaginal swabs from Upson's autopsy that bore semen (3663.00D). Nye believed that the state police crime lab had maintained possession of these items of evidence since lab personnel had collected the items on September 29, 1982 and September 30, 1982.

After examining the evidence related to Upson's murder, Nye received a purple-capped vial of defendant's blood with instructions from Zsenyuk to compare defendant's DNA profile with the genetic profile of the semen found on Upson's pubic hair and on the vaginal swabs. Nye testified that his comparisons revealed that (1) the genetic profile of the male contributor to the vaginal swab was consistent with the DNA profile from defendant's blood sample at the nine locations examined, (2) the genetic profile obtained from defendant's blood sample also was consistent with the DNA profile found within the male fraction of the semen-encrusted pubic hair at all nine locations considered, and (3) if Nye "were to go out in the population and select people at random that were unrelated," he would expect to see the DNA profile" of "the semen donor from the pubic hair as well as the primary donor on [the] vaginal swab" "once in every 3.3 trillion people in the African-American population."

2

With respect to the evidence arising from Koebnick's murder, retired Ann Arbor police detective Robin Winter testified that he went to Koebnick's house on October 1, 1982, and remained there while state police crime lab technicians, including Barna, processed the scene. The testimony of Barna and Winter indicated that they both attended Koebnick's autopsy on October 2, 1982, and that Barna received several items of evidence collected by Dr. Hendrix, including a box containing Koebnick's clothing (L-21), vaginal swabs, and scrapings from Koebnick's fingernails (L-25, right hand; L-26, left). Barna confirmed that he had placed the nonclothing items of evidence from Koebnick's autopsy inside "an empty Kodak photographic paper box," on which he placed his initials and state police laboratory number 13551-82. Barna averred that he took the items obtained during Koebnick's autopsy to the state police lab in Northville, shortly thereafter performed serological examinations that revealed the presence of semen on the vaginal swabs, and maintained the remaining portion of the swabs for future testing.

Forensic scientist Lynne Helton, who worked in the DNA unit of the state police crime lab in Lansing, and Zsenyuk testified that on April 7, 1998, Zsenyuk delivered to Helton for DNA testing several items related to the Koebnick murder scene (lab number 13551-82), including a corset and other clothing of Koebnick, as well as scrapings from Koebnick's fingernails (L-25). Helton testified to her opinion that Zsenyuk had believed that after Koebnick's autopsy, "the integrity of the evidence had been maintained since it had been examined at the Northville Laboratory and then returned to the Ann Arbor Police Department."[17]

[17] Winter testified that he had delivered to Barna for forensic examination several items of evidence related to Koebnick's murder, including her clothing and vaginal swabs, and that he (continued…)

At trial, Helton identified the bag containing the corset of Koebnick that she examined, which bag, labeled L-21B, bore Helton's initials and her written description that the bag contained a "ladies corset." Helton also identified the stained white corset itself, which had "a piece of . . . Michigan State Police evidence tape that bears the lab number 13551-82 and [Helton's] initials." Helton confirmed the presence of semen on Koebnick's corset.[18] Helton averred that the profile of the male or sperm fraction she identified on Koebnick's corset matched defendant's DNA profile[19] at each of the nine genetic regions examined, and that the likelihood of a random match between the DNA profiles found in the semen on Koebnick's corset and a random, unrelated individual amounted to "one in 294.7 trillion for the Caucasian population group; for the African-American population group, one in 3.3 trillion; and in the Hispanic group, one in 289.5 trillion."

Helton also identified at defendant's trials a bag that contained several items of evidence including the fingernail scrapings obtained during the autopsy of Koebnick. On the bag, Helton had written the "unique laboratory number assigned to this case, which is 13551-82, the name of the agency, Ann Arbor, . . . [her] initials," and "a description of the contents of the box which is in this bag." From the scrapings of Koebnick's right hand fingernails, Helton described that she identified a profile of "a single DNA donor," "and that the DNA types at each genetic location matched the DNA types from the known DNA sample from Michael Harris."[20] Helton averred that the same probability estimate that applied to the DNA profile match of the sperm fraction found on Koebnick's corset applied to a random match of the DNA profile found under Koebnick's right fingernails.

(…continued)

retrieved the items from the state police crime lab on August 25, 1983, for storage in the property division of the Ann Arbor Police Department. Zsenyuk identified several Ann Arbor Police Department property room release forms that were prepared with respect to Koebnick's clothing, vaginal swabs, blood sample, and fingernail scrapings.

[18] Helton explained that she cut small pieces of cloth from the corset for testing purposes, that "biological material remain[ed] on the corset," and that "there still is a portion of the cutting that [she] preserved and froze in storage at the Northville Crime Lab that would be available for testing purposes."

[19] Helton confirmed that on May 19, 1999, she received for DNA comparison purposes a dried blood sample of defendant from East Lansing crime lab forensic scientist Julie Howenstein. The testimony of Walker, retired Ann Arbor police officer Joseph Wesolowski, Zsenyuk and Helton reflected that on January 18, 2001, Walker and Wesolowski visited the Brooks Correctional Facility where they watched as registered nurse Gloria Smith drew blood from defendant and placed it inside three purple-capped vials; Walker, Wesolowski and Smith marked each of the vials with their initials; Walker and Wesolowski took the vials to Zsenyuk; on January 22, 2001, Wesolowski received from Zsenyuk two of the vials of defendant's blood, which Wesolowski logged into then immediately out of the Ann Arbor Police Department's property storage unit; and on January 22, 2001, Wesolowski traveled to the state police crime lab in Northville where he personally handed two vials of defendant's blood to Helton.

[20] Helton recounted that she also received from Zsenyuk an envelope labeled "vaginal swabs," but that the envelope contained only "broken sticks . . . consistent with the stick remaining after the vaginal swab was removed, . . . and one microscope slide with dried biological material still adhering to it."

Stephen Milligan, a forensic scientist at the Michigan State Police crime lab who specialized in DNA identification, testified that on October 18, 2000, Barna placed in a laboratory refrigerator for his examination several pieces of evidence related to laboratory case number 13551-82. Milligan recounted that on November 13, 2000, he retrieved from the laboratory refrigerator a plastic cryobox that contained a cryotube, in which he found three cotton swabs labeled "vaginal swabs" and "laboratory number 13551-82." Milligan preserved one swab for future testing. Milligan recalled that on February 6, 2001, he received for the purpose of comparing defendant's DNA profile with the profiles he identified from the vaginal swabs of Koebnick a report by Nye that had developed a DNA profile of defendant. According to Milligan, the lone DNA profile that he identified within the sperm fraction from the vaginal swab of Koebnick matched defendant's DNA profile at each of the nine genetic locations examined, and the "probability of selecting an unrelated individual at random from the population having the profile matching that of the sperm fraction of the vaginal swab that was typed . . . is one in 294.7 trillion in the Caucasian population, one in 3.3 trillion in the African-American population and one in 289.5 trillion in the Hispanic-American population."

The above testimony by police personnel and forensic scientists tracing the incriminating evidence from the Upson and Koebnick crime scenes to the state police forensic laboratories sufficiently demonstrates that the various samples ultimately examined were indeed what the forensic experts reported them to be. See MRE 901(b)(1) (explaining that "[t]estimony that a matter is what it is claimed to be" satisfies the authentication condition precedent to admissibility of evidence).[21] While defendant (1) questioned witnesses at length concerning perceived breaks or deficiencies in the chain of custody of the forensic evidence received by the state police crime lab, including with respect to the facts that (a) Helton received an empty envelope labeled as the vaginal swabs from Koebnick, (b) Condron had signed a report in June 1983 indicating that he transported to the Ypsilanti Police Department for storage several types of items related to the Upson case that were similar to items allegedly maintained by the state police crime lab, and (c) at some point between 1982 and the DNA testing performed in these cases, items of evidence might have been transported between state police crime laboratories in Northville and East Lansing,[22] and (2) complains on appeal that retired technician Day, who collected some evidence at the scene of Upson's murder, did not testify at his trials, any alleged defects in the chains of custody go toward weight of the DNA testimony by the forensic experts, not its admissibility. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991) (observing that "[i]t is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt," but it "need only meet the minimum requirements for admissibility" under MRE 901); *People v King*, 58 Mich App 390, 398-399; 228 NW2d 391 (1975) (rejecting that the defendant's allegations of breaks in the chain of custody of evidence precluded its admissibility, and finding

[21] Defendant offers no authority in support of his suggestion that the forensic experts' testimony lacked any probative value because the prosecutor failed to introduce the physical samples of defendant's blood or samples of the actual DNA that they examined. *Harmon*, *supra* at 533.

[22] Barna testified that DNA testing by the state police became centralized in the Lansing laboratory beginning in 1996, and that he supervised the relocation process by which "there were samples that were transferred [from Northville] for long-term storage to Lansing during that period of time."

that the objections went only toward the weight of the evidence). In these cases, the juries plainly found probative the DNA evidence to which the forensic experts testified, and this Court will not revisit on appeal the jury's weighing of the evidence. *Nowack*, *supra* at 400; *Elkhoja*, *supra* at 442.

IX

In Docket No. 248247 and Docket No. 253337, defendant claims that the prosecutor's failure to call endorsed fingerprint expert witness Margaret Huston at his trials, and the circuit court's admission of fingerprint testimony by an unqualified witness, Helton, violated his due process right to exculpatory material and his Sixth Amendment right of confrontation. Although the prosecutor periodically updated the circuit court during the trials with respect to the remaining witnesses it intended to call, and ultimately rested without calling Huston to the witness stand, at no time did defendant object or otherwise suggest that the failure to call Huston affected his constitutional rights. Consequently, we will review this claim for plain error affecting defendant's substantial rights. *Geno*, *supra* at 626. Defendant did object during both trials, and thus preserved his objection, to Helton's brief fingerprint testimony, the admission of which we review for a clear abuse of discretion. *Starr*, *supra* at 494.

With respect to the prosecutor's failure to call Huston at either trial, no violation of defendant's due process right of access to exculpatory information occurred because (1) the prosecutor did not suppress evidence of Huston's conclusions that no prints obtained by the police matched those of defendant, (2) on January 28, 2003, shortly before the commencement of the Upson murder trial and many months before the Koebnick trial began, defendant filed a notice of proposed defense exhibits that listed "michigan state police report by margaret huston, in the marjori [sic] upson case, dated 1-14-83," "michigan state police report by margaret huston in the florence bell case, dated 1-14-82," and "Michigan State Police report by Margaret Huston, in the Louise Koebnick case, dated 2-28-83," which notice plainly reflects defendant's knowledge of and access to Huston's conclusions, and (3) defendant suffered no prejudice arising from Huston's failure to appear at the trials, given that at each proceeding he repeatedly elicited from various witnesses that no fingerprints obtained from any of the three 1982 murder scenes matched his prints. MCL 769.26; *People v Fox*, 232 Mich App 541, 549, 551-552; 591 NW2d 384 (1998); *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). To the extent that defendant asserts an infringement of his right of confrontation arising from the prosecutor's failure to call Huston, as discussed above, a defendant has no right to cross-examine a witness not produced by the prosecution when he "does not explain why he was unable to call the[witness] . . . on his own." *Lee*, *supra* at 257-258.

Concerning Helton, she testified that during her forensic examination of the knife blade and knife handle found near Bell's body, she observed along the top edge of the knife handle some uniformly spaced ridges in black fingerprint detection powder that possibly represented a partial finger or palm print, or an imprint by a fabric glove. The circuit court did not abuse its discretion by overruling defendant's objections premised on Helton's lack of expertise in light of Helton's testimony that she regularly worked in the field as a crime scene technician and

attended ongoing training concerning crime scene evidence location and collection.[23] *Starr*, *supra* at 494. Although the circuit court did not specifically declare Helton an expert in the area of fingerprint collection and examination, her description of the possible fingerprint or glove imprint represented an "opinion[] or inference[] . . . rationally based on the perception of the witness." MRE 701(a).

Even assuming that the circuit court erred by admitting Helton's print observation testimony, defendant fails to explain how Helton's testimony may have prejudiced him. *Harmon*, *supra* at 533. In light of the fact that Helton testified only briefly to her observation and made no attempt to offer opinion testimony concerning a comparison of the potential fingerprint or glove imprint with defendant's prints or any other evidence presented during either trial, we conclude that no prejudice exists that warrants appellate relief. MCL 769.26; MRE 103(a); MCR 2.613(A).

X

Defendant contends in Docket No. 253337 that his trial for Koebnick's murder, after already having undergone a trial for Upson's murder during which the prosecutor introduced evidence that defendant allegedly killed Koebnick, violated collateral estoppel and double jeopardy principles. We disagree.

We review de novo issues involving double jeopardy principles and the application of collateral estoppel. *Geno*, *supra* at 627; *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 33-34; 620 NW2d 657 (2000).

The prosecutor did not previously place defendant in jeopardy of conviction for Koebnick's murder during the Upson trial in LC #01-002001-FC given that (1) the amended information in LC #01-002001-FC asserts charges against defendant arising only from the death of Upson, (2) the jury found defendant guilty of murdering only Upson in LC #01-002001-FC, and (3) the circuit court imposed sentence in LC #01-002001-FC only for defendant's murder of Upson. Collateral estoppel does not apply because no questions of fact essential to a conviction of defendant for murdering Koebnick were actually litigated and determined by a valid and final judgment in LC #01-002001-FC. *Minicuci*, *supra* at 33.

XI

In Docket No. 253337, defendant lastly argues that the prosecutor violated a stipulation concerning independent testing of the DNA evidence by apprising the independent laboratory, Lab Corp, of the nature of the substances the state police allegedly found on the items of physical evidence, and by failing to request that Lab Corp preliminarily identify the nature of the biological fluids on the items of physical evidence. Defendant suggests that the prosecutor's actions deprived him of exculpatory evidence, a fair trial, and his right to present a defense. Defendant has not preserved for appellate review the several claims of constitutional violations

[23] At the Koebnick murder trial, Helton further explained that she had examined hundreds of items bearing fingerprints or glove imprints.

that he raises in his brief on appeal,[24] which this Court will review only for plain error that affected his substantial rights. *Geno*, *supra* at 626.

We conclude that the prosecutor's alleged violation of the terms of the parties' independent testing agreement did not result in a plain constitutional error that affected the outcome of defendant's trial. Defendant's varied allegations of constitutional violations stem from his complaint that the prosecutor precluded him from presenting exculpatory information to the jury, specifically evidence supporting his contention that the biological material tested by the Michigan State Police experts derived from a biological substance other than semen. According to defendant, a conclusion by the independent expert that the biological substances tested did not include semen would have supported his theory that the police or forensic experts somehow obtained saliva or skin or blood samples that they falsely labeled as semen to obtain his conviction for the murders.

To resolve this issue, we may assume that the prosecutor violated an agreement with defendant concerning the terms of the independent testing by permitting Lab Corp to receive two items already identified as semen (on a doily from Bell's house and on Koebnick's corset), and by failing to ensure that Lab Corp determined what substances might exist on the various items of evidence it received for independent testing. To the extent that defendant suggests the prosecutor suppressed exculpatory evidence, his claim fails because no indication exists that the prosecutor possessed serological testing evidence favorable to defendant, i.e., testing evidence suggesting that some biological fluid other than semen existed on the tested items, let alone that the prosecutor suppressed this favorable evidence. *Lester*, *supra* at 281-282.

Furthermore, even assuming that the prosecutor engaged in willful misconduct when it failed to arrange for preliminary serological testing of the fluids on the items submitted to Lab Corp, the prosecutor's action did not affect the outcome of defendant's trial for Koebnick's murder in light of the facts that (1) defendant successfully elicited from Lab Corp expert Shawn Weiss, and thus placed before the jury, the notion that the items of evidence related to the Upson and Koebnick murders might have contained blood, saliva, urine or other biological material instead of semen; (2) during his closing argument, defendant repeatedly emphasized to the jury his belief that the police and forensic experts had conspired to fabricate evidence against him, including by placing DNA from his blood samples on the crime scene evidence and then falsely characterizing the DNA found thereon as deriving from semen; (3) as discussed above, the prosecutor presented ample testimony to establish the chain of custody of the various items of evidence tested by forensic scientists at the state police crime lab, which testing resulted in matches or inclusions of defendant's DNA profile as that existing on various items of evidence from each of the Upson, Koebnick and Bell murder scenes; and (4) the independent testing by

[24] The parties discussed before the circuit court the appointment of an independent DNA expert and the scope of the testing the expert should provide, and the court addressed this question. But after the parties' submission of particular items of evidence to Lab Corp for independent testing, defendant at no time raised a constitutional or other objection of any kind to the prosecutor's alleged violation of the terms of the parties' agreement with respect to independent testing.

Lab Corp similarly linked defendant's DNA profile to the crime scene evidence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly