Michigan State Appellate Defender Office (SADO)
& Criminal Defense Resource Center (CDRC)
www.sado.org

DNA Analysis in Criminal Cases: Understanding the fundamentals of DNA Testing and Identifying Current Legal Issues

SADO Lansing, Wednesday April 13, 2016, 2pm to 4pm
200 N. Washington Sq., Suite 250, Lansing, MI 48933

Presented by: Amanda Tringl, DNA Project Attorney
Special Assistant Defender, State Appellate Defender Office

About the Instructor

Amanda Tringl is originally from St. Louis, MO. She graduated in the top of her class from the University of Missouri-Columbia (Mizzou) in 2008 with a major in Political Science and a minor in Sociology. Amanda moved to Michigan in 2008 when she received a 75% scholarship to Thomas M. Cooley Law School. While enrolled at Cooley, Amanda was very active student in organizations, and served as Senator and Social Director of the Student Bar Association, a Cooley Ambassador, a member of the American Inns of Court, and a member of the Women's Law Association. Amanda was also on the Assistant Board of Editors of the Cooley Law Review. In recognition of her contributions to the student body, Amanda was awarded Cooley's most prestigious student award, the Leadership Achievement Award.

Amanda obtained valuable practical experience while interning with the Cooley Innocence Project and Washtenaw Public Defender's Office. While interning at the Cooley Innocence Project, Amanda evaluated post-conviction cases under Michigan's DNA statue, MCL§ 770.16, for inmates claiming actual innocence. Amanda had the opportunity to write an Application for Leave to Appeal for the Michigan Court of Appeals, which explained the definition and scientific process of DNA testing. The Michigan Court of Appeals granted leave to appeal and ultimately issued an Opinion in favor of her client and granting DNA testing. Amanda graduated Cum Laude from Thomas M. Cooley Law School in January 2012. She has been licensed to practice law in Michigan since April 2012.

Upon admittance to the Michigan Bar, Amanda was a solo practitioner practicing primarily criminal law. During this time, she was on the Ingham County felony court- appointed attorney list, and a part-time grant staff attorney at Cooley Innocence Project. In September 2013, she accepted a law clerk/bailiff position with Lansing 54A District Court Judge, Honorable Hugh B. Clarke, Jr. In June 2015, Amanda began the important work of DNA Project Attorney at the State Appellate Defender Office. As SADO's DNA Project Attorney, Amanda screens previously adjudicated Wayne County convictions associated with the approximately 11,000 abandoned sexual assault kits for potential wrongful convictions. Amanda investigates and identifies cases for DNA testing, interviews and counsels previously adjudicated individuals about benefits and potential consequences of DNA testing, works with DNA experts and independent labs to implement the testing process, and litigates post-conviction motions. Additionally, Amanda is currently a volunteer supervisor at the WMU-Cooley Innocence Project, and she is a volunteer member of the Kit Backlog Auditing Committee of the Sexual Assault Evidence Kit Commission.

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Contact the CDRC Team:
(313)-256-9833

Marilena David-Martin, Administrator, mdavid@sado.org
Bill Moy, Production Manager, bmoy@sado.org
Heather Waara, Administrative Assistant, hwaara@sado.org

DNA Analysis in Criminal Cases:

Understanding the fundamentals of DNA Testing and Identifying Current Legal Issues.

What is DNA?

- Deoxyribonucleic Acid (DNA)
- Blueprint for human development
  - one set of blueprints per human (Genome)
  - 99% identical among all humans
  - Remaining 1% makes you recognizable as an individual, so polymorphic (or highly variable) regions of DNA are targeted for analysis.
- Two kinds: 1. Nuclear, 2. Mitochondrial
- Nuclear DNA is bundled into 46 chromosomes, which form 23 pairs.
  - 23 from egg (mother), 23 from sperm (father)
  - 1 pair of chromosomes determines sex
    - XX female, XY male
  - 22 pairs of chromosomes determine physical attributes, regulate development, etc.
- Many Mitochondria (passed from mother to all of her children)

DNA Inheritance and Biological Relatedness

- DNA shared by a person and his/her:
  - Parents: exactly 1/2
  - Full siblings: 1/2 on average
  - Half siblings: 1/4 on average
  - First cousins: 1/8 on average
  - Identical Twins: Genetically indistinguishable with current forensic methods

Sources of Biological Material

- Blood
- Semen
- Saliva
- Urine
- Vomit
- Hair
- Feces (difficult, many inhibitors, need specialized lab)
- Bone
- Epithelial (skin) cells
- Teeth
- Sweat
- Tissue

Potential DNA Evidence:

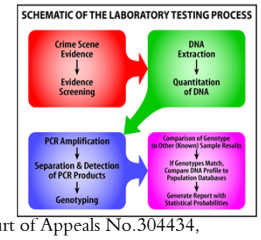
- Sexual Assault Kits
- Masks
- Hats/ sweatbands
- Gloves
- Clothing
- Bedding
- Fingernail scrapings
- Ligatures (rope, wire, cord)
- Bottles/ cans
- Earrings
- Watches
- Combs
- Eyeglasses
- Bite marks
- Condoms
- Toothbrushes
- Chewed gum
- Toothpicks
- Used Tissues
- Licked stamps/envelopes
- Cigarette butts
- Keys
- Guns/ knifes/ bats
- Bullets

Probative Items of Evidence from Crime Scenes

- The best DNA evidence arises when a person's DNA is found where it is not supposed to be.
  - Items moved by the perpetrator
  - Items left behind by the perpetrator
  - Points of entry or exit
  - Recovered stolen items
- Police questioning may focus on this principle.
  - i.e.: Do you know the victim? Have you ever been here? Initial photographs.

DNA Testing Process

1. Evidence Screening (serology testing)
2. Extraction
3. Quantitation
4. Amplification
5. Separation
6. Analysis and Interpretation



See *People v Evans,* Michigan Court of Appeals No.304434, Nov. 15, 2012, unpublished.

DNA Testing Process:
1. Serology/Evidence Screening

- Presumptive testing:
  - Sensitive.
  - Somewhat specific to body fluids, but **cannot** unequivocally determine if a particular body fluid is on an item (false positives).
  - Only indicate a body fluid *might* be present.
  - Fast.
- Confirmatory Testing:
  - Specific to particular body fluids and/or sometimes to a particular species.
  - DNA testing considered confirmatory.

DNA Testing Process:
1. Serology/Evidence Screening (cont.)

Identifying Semen: seminal fluid and spermatozoa (sperm)

- Presumptive:
  - Ultraviolet (UV) Light or Alternate Light Source
  - **Acid phosphatase** (AP) screening:
    - screen for seminal fluid using Brentamine spot test.
- Confirmatory:
  - Microscopic Identification of Sperm:
    - stains commonly used for visualization of sperm are nuclear fast red (red stain) and picroindigocarmine (green stain)
  - Protein Confirmation of Semen:
    - test for a protein specific to semen known as **prostate-specific antigen** (aka PSA or p30)
  - DNA Testing

DNA Testing Process:
1. Serology/Evidence Screening (cont.)

Identifying Blood:

- Presumptive:
  - Phenolphthalein (PH):
    - Very sensitive, false + for: rust, copper, metal salts, salt-treated lumber, potatoes, horseradish.
  - Luminal and fluorescein test:
    - for large surfaces, very sensitive, same false + as PH, plus bleach and other cleaners.
  - Tetramethylbenzidine (TMB):
    - less sensitive, more specific than PH
  - Leuvomalachite green (LMG)
  - Species Testing of Blood
- Confirmatory:
  - ABO Blood typing
  - DNA testing

DNA Testing Process:
1. Serology/Evidence Screening (cont.)

Identifying Saliva:

- Presumptive:
  - Fluoresce/ Alternate light
  - **Amylase Screening-** enzyme found at high level in saliva, but also found in other body fluids, plants, and some bacteria. Doesn't confirm the presence of salivary amylase.
- Confirmatory:
  - DNA testing

DNA Testing Process:
2. Extraction

- **Extraction:** the process of purifying DNA cells from an item (substrate), releasing and separating the DNA from the cells and inhibitors.
  - **<u>Differential DNA Extraction:</u>**
    - A type of extraction from intimate samples, which takes the mixed sample and attempts to separate DNA derived from spermatozoa from all other sources of DNA, resulting in a sperm fraction (SF) and a non-sperm or epithelial cell fraction (EF).
    - Differential extraction is NOT exact.
- Must be processed concurrently with an extraction negative control (aka reagent blank) to monitor for contamination.
  - Reagent blanks should never give a DNA result, unless it is contaminated.

DNA Testing Process:

3. Quantitation

- Measuring how much DNA is present.
  - Is there enough to test?
  - Which testing method is best for the amount of DNA present?
    - Issues result with using too much or too little DNA (ie allelic drop out, stutter, etc.)

DNA Testing Process:

4. Amplification

- (Polymerase Chain Reaction or PRC) Copying the specific regions on the DNA strand, yielding more DNA for examination, with tags.

DNA Testing Process:

5. Separation

- The extracted and now amplified DNA must be separated so that alleles can be differentiated from each other.

DNA Testing Process:
6. Analysis and Interpretation

- Forensic DNA analysts must convert fluorescence data (peaks on an electropherogram) into information that can be shared and communicated with lay persons.
  - When interpreting the data, analysist have much more discretion, and thus potential bias, than often realized.

Types of DNA Testing

- Nuclear v. Mitochondrial

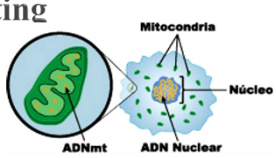
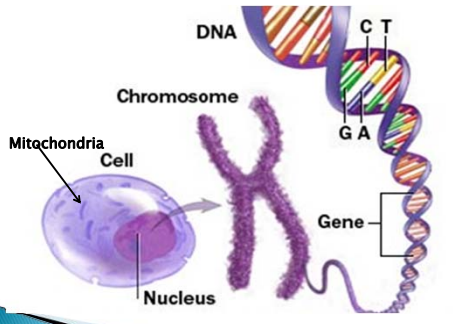


Image: http://www.sandiegored.com/

- Nuclear
  - STR analysis **(autosomal)**
  - Y-STR analysis (**haplotype**)

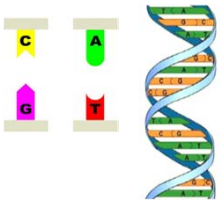
Nuclear DNA Basics



Nuclear DNA Basics

- DNA is comprised of only four building blocks (**bases**): **G**uanine, **C**ytosine, **T**hymine, **A**denine.
- Each base must pair with one other base, creating a helix.
  - A=T, G=C

The DNA Initiative: www.dna.gov.



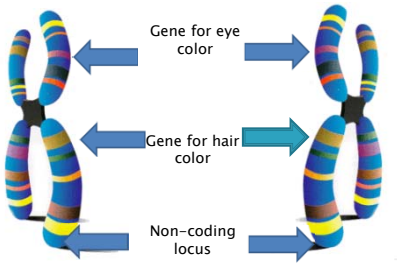
DNA Basics

- **Locus/Loci**: (**aka "marker"**) Specific location(s) of DNA.
  - –May or may not represent a gene (non-coding DNA)
- **Gene**: A particular site or location on the DNA, generally thought to encode a visible trait or functional protein
  - –Genes for hair color or eye color
  - –Like a chapter in a book
- STR testing DNA locations are specifically selected to be:
  - privacy protecting, by using non-coding or "junk" regions that reveal nothing about one's genetic traits,
  - "Polymorphic"- highly variable between individuals, and
  - Easy to work with in the lab- easily amplified and interpreted by the electrophoresis instrumentation

DNA Basics

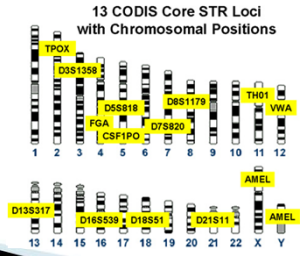
- **Allele**: One of the possible forms of a given gene
  - Red hair allele, blonde hair allele, brown hair allele
- **Polymorphism**: The existence of a gene in several forms. The more polymorphic the gene, the more variations of the trait it encodes.
  - Also includes length polymorphism
    - Many areas of DNA contain repeating units
    - GGGA-GGGA-GGGA-GGGA
    - Some are long, some are short (3-4 repeats or +40 repeats)
    - All are inherited from your parents
- The polymorphisms tested in forensics are length polymorphisms.
  - Reported as a number
  - The number indicates the length of the DNA repeat sequence.

Nuclear DNA Basics



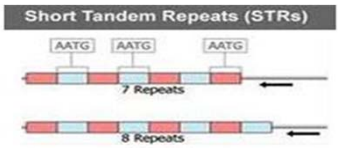
Nuclear DNA Testing

- DNA testing kits test at 13-16 regions (aka "markers" or "loci")



STR – Short Tandem Repeat

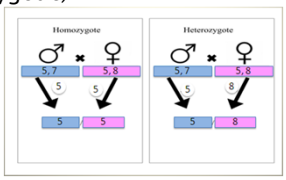
- STRs demonstrate Length Polymorphism or Length alleles



- To determine the "alleles" at a particular locus, just count the number of repeats.
  - Repeat sequence = AATG
  - Result reported is 7, 8.
    - Image : http://www.hawgoodfamily.co.uk

STR

- Each locus has two alleles (one from each parent) – may be the same (homozygotic) or different (heterozygotic)



STR (Short Tandem Repeat):

- late 1990s-present
  - Advantages:
    - Much more sensitive than older methods
    - Number of markers makes it highly discriminating. Unique profile, except identical twins.
    - Compatible with State and Federal (CODIS) databases
    - Allows for sex typing
      - Differential extraction was also developed around the same time.
  - Disadvantages:
    - Masking (high female/male DNA ratio
    - Mixtures

Nuclear DNA Testing - Statistics

- The probability of a random match is calculated by applying the **product rule** to the probability of the allele found at each locus.

TPOX	0.195
D3S1358	0.075
FGA	0.036
D5S818	0.158
CSF1PO	0.112
D7S820	0.065
D8S1179	0.067
TH01	0.081
VWA	0.062
D13S317	0.085
D16S539	0.089
D18S51	0.028
D21S11	0.039

0.195 x 0.075 = 0.0146 = 1 in 68 people (1/.0146)

0.195 x 0.075 x 0.036 = 0.0005 = 1 in 2000 people (1/.0005)

Etc.

Multiply them ALL together and you get 1 in 594 trillion!

Table: promega.com, Allele Frequencies

Modified from DNA.gov.

Nuclear DNA Testing – Statistics

- Caveats
  - In order to call a DNA inclusion, must have a stat.
    - See *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000), holding a DNA analysis was not admissible without accompanying statistical evidence.
  - Can't use product rule for Y-STR or Mito
    - Labs use the Counting Method and Apply a 95% confidence interval to determine inclusion stat
  - Can't use random match probability for complex mixtures
  - Other ways to calculate stats:
    - CPI
    - Likelihood Ratios

Other Current DNA Testing Methods

- "Touch DNA"
- Evidence left behind that is not visible to the naked eye.
  - 30-40,000 skin cells shed per hour, so ~500/minute
  - With more contact and/or textured surfaces, more skin cells are left behind
  - A minimum of ~20 skin cells are needed for a forensic profile
  - –Handling an object for ~5 seconds. But, the more handling, the better the profile.
  - May be the only DNA evidence at non-violent crimes
- Very sensitive testing, requires care.
  - –Extremely low quantities of DNA are present.
  - •Likely will not give complete results (partial profile).
- **Frequently** result in mixtures of the DNA from more than one individual.

Other Current DNA Testing Methods

- **MiniFiler STR**: late 2000s – present
  - Advantages
    - Good for degraded samples
    - More sensitive so less DNA needed
    - Good as adjunct to STR
      - Where STR only gets partial profile, miniSTR may help to obtain a more complete profile
  - Disadvantages
    - Because it is more sensitive, can produce complex mixed profiles, including contaminants
- Other Newer Kits That May Be Good for Degraded/Inhibited Samples
  - **Powerplex Hot Start (HS) 16**
  - **Identifiler Plus**
  - **Globofiler**

Other Current DNA Testing Methods

- **Y-STR (Y Chromosome DNA Testing)**: early 2000s-present
  - Variant of autosomal STR that tests for DNA in the Y chromosome
  - Advantages
    - Good for use in samples with little male DNA and lots of female DNA, OR delayed evidence collection, so no sperm present.
    - Good for use in samples with DNA from multiple males
    - Paternally inherited so you can use relatives' DNA as elimination samples
  - Disadvantages
    - Paternally inherited so it's not as discriminating as STR and NOT UNIQUE, as it passes UNCHANGED
    - Not compatible with CODIS
    - Can't be used where paternal relative or female is alternative suspect
- See ***People v Wood*, 307 MichApp 485 (2014).**

Other Current DNA Testing Methods

- **Mitochondrial DNA testing**: late 1990s-present
  - Advantages
    - Good for testing hairs without roots
    - Maternally inherited so you can use relatives' DNA as elimination samples
  - Disadvantages
    - Maternally inherited and passes UNCHANGED so less discriminating than STR (NOT UNIQUIE)
    - One's mtDNA may be different in different parts of their body.
    - Population database less reliable.
    - Not compatible with CODIS or state databases
    - Mixtures are extremely difficult to interpret

Other Current DNA Testing Methods

- **Y-STR (Y Chromosome DNA Testing)**: early 2000s-present
  - Variant of autosomal STR that tests for DNA in the Y chromosome
  - Advantages
    - Good for use in samples with little male DNA and lots of female DNA
    - Good for use in samples with DNA from multiple males
    - Paternally inherited so you can use relatives' DNA as elimination samples
  - Disadvantages
    - Paternally inherited so it's not as discriminating as STR
    - Not compatible with CODIS
    - Can't be used where paternal relative or female is alternative suspect

Possible Results Upon Profile Comparison:

1. **"match" or "inclusion"**
2. **"consistent with" or "failure to exclude"**
3. **"nonmatch"** or **"exclusion"**
4. **"inconclusive" –** If there are insufficient data to support a conclusion, the finding is often referred to as

Strategies For Using DNA To Exonerate

- Three main ways that DNA can be used to exonerate:
  - Exclusion of defendant from probative item
  - Exclusion plus getting redundancy
  - Exclusion plus identifying contributor of DNA

Issues:

- **Mixtures**
  - •Indicates DNA left behind from more than one person
  - •Can be interpretable or uninterpretable
  - •*May* be able to identify the predominant or "major" contributor
  - •Common with touch DNA samples
  - •Consider the source of your DNA
    - –Gender of source can help
  - • Expectation or "**confirmation bias**" can cause analysts to:
    - Rationalize results based on "masking"
    - Incorrectly attribute peaks associated with a mixture to one of multiple contributors
    - Interpret a heterozygotic peak (twice as tall) as excess genetic material from multiple contributors, or vice versa

Issues:

- **Masking**
  - Often overwhelming victim DNA can "Mask" suspect DNA
    - -Seen in rape cases where the victim's DNA is in high quantity as compared to a low quantity of suspect DNA
    - -Swabbings of bitemarks

Issues:

- **Contamination or Secondary Transfer**
  - DNA can be carried off from the original location
  - Three forms:
    - – Person-person-object
      - Handshake to a weapon
    - – Person-object-person
      - Suspect to knife to bystander
    - – Person-object-object
      - Bystander-towel-gun

Michigan DNA Statute

MCL 770.16 is a potential resource to get a new trial for potentially innocent clients – with limitations:

- Only pertains to those convicted at trial
- Was the biological evidence retained in condition suitable for reliable testing?
- Requires demonstrating by clear and convincing evidence that
  - The biological evidence is still available,
  - Evidence was never tested; or if previously tested, new testing would yield different results, and
  - Identity was at issue at trial
- But, post 2001 convictions, Defendant must also show:
  - DNA testing was done at trial,
  - Testing was "inconclusive"
  - Testing with current technology could give a conclusive result.

DNA Case Law

- *People v. Barrera,* 278 Mich.App. 730, 737, 752 N .W.2d 485 (2008).
  - Issue: Evidence sought to be tested *is material to the issue of the convicted person's identity as the perpetrator…*of the crime.
  - The COA interpreted the language in § 16(4)(a), which at that time was found in § 16(3)(a), holding that biological evidence "must be of some consequence to the issue of identity" or, stated differently, that there must be "some logical relationship between the evidence sought to be tested and the issue of identity."
  - The language in MCL 770.16(4)(a) "requires a defendant to link DNA evidence sought to be tested to both the crime and the criminal in order to show materiality...." *Id.* at 740, 752 N.W.2d 485.

DNA Case Law

- *People v Poole,* 311 Mich App 296 *app den* 498 Mich 922; 871 NW2d 197 (2015)
  - DNA testing could be inconclusive, could point to defendant as being a donor, or could exclude defendant as the source of any blood samples, along with potentially identifying another specific individual as the donor, thereby clearly satisfying MCL 770.16(4)(a). Because DNA testing of a blood sample could possibly connect another person to the crime scene or exclude defendant, the sample would be of some consequence or have a logical relationship to the issue of identity and would be linked to both the crime and the criminal. In other words, the blood samples would necessarily be material to defendant's identity as the perpetrator.

Other Resources:

- A Simplified Guide to a variety of Forensic science topics, including DNA: www.forensicsciencesimplified.org.
- The DNA Initiative: www.dna.gov.
- Principles of Forensic DNA for Officers of the Court: http://projects.nfstc.org/otc/

Glossary of Common Terms

Allele calls: Allele calls for STRs are the designated numbers given to each allele detected for a genetic marker. For amelogenin, allele calls correspond to the designated letter(s) — X and Y — that denote the detected DNA fragment or fragments. Allele calls can be generated manually or via a software program.

Allele frequency: The proportion of a particular allele in a population or population category (e.g., Caucasian, African-American, Hispanic or Asian). Allele frequencies are calculated using the number of times an allele is observed in a sampling of persons within a population. Allele frequencies are then used to determine the probability that a particular DNA profile might occur randomly in the larger population from which the sampling was obtained.

Alleles: Different forms of a gene or genetic marker at a particular locus. An allele is described as the characteristics of a single copy of a specific gene or of a single copy of a specific location on a chromosome. For example, one copy of a specific short tandem repeat region might have 10 repeats, while the other copy might have 11 repeats. These would represent two alleles of that short tandem repeat region, designated as alleles 10 and 11, respectively.

Allelic drop-in: An allele not originating from the sample but appearing on the electropherogram, often caused by low-level contamination or use of robotic systems for analysis.

Allelic drop-out: Failure to detect an allele within a sample, or failure to amplify an allele during a polymerase chain reaction (PCR).

Amelogenin: Referred to as the gender differentiation locus, and colloquially as the sex determination locus. It is a gene present on the X and Y sex chromosomes that is used in DNA identification testing to determine the gender of the DNA donor in a biological sample.

Amplified DNA: A DNA sample that has undergone the polymerase chain reaction process (PCR). Also referred to as an *amplicon.*

Analytical documentation: The documentation of procedures, standards, controls and instruments used; observations made; results of tests performed; and charts, graphs, photographs and other documentation generated that are used to support the analyst's conclusions for a case.

Analytical procedure: A defined progression of steps designed to ensure uniformity of a testing process by all analysts within a laboratory on a day-to-day basis and over time.

Analytical threshold: The minimum height requirement at and above which detected peaks can be reliably distinguished from background noise on an electropherogram; peaks above this threshold are generally not considered noise and are either true alleles or artifacts.

Artifacts: Any non-allelic products of the amplification process (e.g., stutter or minus A/nontemplated nucleotide addition), anomalies of the detection process (e.g., pull-up or spike), or by-products of primer synthesis (e.g., a dye blob).

Autosomal STR analysis/locations: DNA analysis that targets autosomal chromosomes for short tandem repeat typing. Autosomal pertains to chromosomes that are not sex chromosomes. Individuals normally have 22 pair of autosomes and one pair of sex chromosomes (X,X in females or X,Y in males).

Electropherogram: The graphic representation of the separation of molecules by electrophoresis or other means of separation.

Electrophoresis: A method of separating large molecules (such as DNA fragments) from a mixture of similar molecules. An electric current is passed through a medium at a different rate, depending on its electrical charge and size. Separation of DNA markers is based on these differences.

Haplogroup(s): A group of similar haplotypes that share a common ancestor with a single nucleotide polymorphism mutation.

Haplotype(s): The term for denoting the collective genotype of a number of closely linked loci on a chromosome that are inherited together or the sequence of the control regions of mitochondrial DNA that pass from a mother to her offspring unchanged.

Inconclusive or uninterpretable results: Interpretations or conclusions for which the DNA typing results are insufficient, as defined by the laboratory, for comparison purposes. A situation in which no conclusion can be reached regarding testing performed can be due to a number of situations, including no results obtained, uninterpretable results obtained, or no exemplar or standard being available for testing.

Locus (pl. loci): The specific physical location(s) of gene(s) on a chromosome.

Low copy number (LCN) DNA testing: Typically refers to either the examination of less than 100 picograms (0.1 nanogram) of input/template/ sample DNA, or the analysis of any results below the stochastic threshold values used for normal interpretation. Also called *low-level* or *low-quality template DNA.*

Major contributor(s): The individual(s) who account for the major portion of DNA in a mixed biological sample.

Masked allele: An allele of a minor contributor that may not be readily distinguishable from the alleles of the major contributor or an artifact.

Minor contributor(s): The individual(s) who account for the lesser portion of DNA in a mixed biological sample.

Mixture: A DNA typing result originating from two or more individuals.

Relative fluorescence unit (RFU): A unit of measurement used in electrophoresis methods involving fluorescence detection. Fluorescence is detected on the charge coupled device (CCD) array as the labeled fragments, separated in the capillary by electrophoresis and excited by the laser, pass the detection window. The software interprets the results, calculating the size and relative quantity of the fragments from the fluorescence intensity at each data point.

Scientific Working Group on DNA Analysis Methods (SWGDAM): A group of approximately 50 scientists representing federal, state and local forensic DNA laboratories in the United States and Canada. SWGDAM generates and promulgates interpretation guidelines for use by forensic DNA testing laboratories.

Short tandem repeat (STR) DNA analysis/ typing: A method of DNA analysis that targets regions on the chromosome that contain multiple copies of a short DNA sequence in succession.

Stochastic effects: The observation of peak imbalance and/or allelic drop-out within a given locus resulting from random, disproportionate amplification of alleles in low-quantity template, also called low level DNA, samples.

Stochastic threshold: The peak height value above which it is reasonable to assume that, at a given locus, allelic drop-out of a sister allele has not occurred.

Stutter: The tendency of PCR product to become displaced typically by one repeat unit compared to the template DNA during the reaction. This results in DNA fragments that are one repeat unit shorter or longer than the desired fragment size.

Touch DNA: DNA that is left behind, typically from skin (epithelial) cells, when a person touches or otherwise comes into contact with an item or person.

Y-STR DNA analysis/profile/typing: DNA typing in which short tandem repeats (STR) are analyzed on the Y, or male, chromosome. This is one variant on the pair of chromosomes (also called *sex chromosomes*) in a DNA sequence that define the sex of an individual.

Sources: National Institute of Justice, *DNA for the Defense Bar* (June 2012); *SWGDAM Interpretation Guidelines for Autosomal STR Typing* (2010).

278 Mich.App. 730
Court of Appeals of Michigan.

PEOPLE of the State of
Michigan, Plaintiff–Appellee,
v.
Robert BARRERA, Defendant–Appellant.

Docket No. 273882.
|
Submitted March 5, 2008, at Lansing.
|
Decided May 1, 2008, at 9:05 a.m.

Synopsis
Background: Inmate petitioned for release and testing of biological evidence. The Ingham Circuit Court, Joyce Draganchuck, J., denied petition. Inmate appealed.

[Holding:] The Court of Appeals, Donofrio, J., held that biological evidence on shorts and panties was linked to crime and perpetrator's identity so as to support petition for DNA testing.

Reversed and remanded.

West Headnotes (6)

[1]

The primary goal of statutory interpretation is to give effect to the intent of the Legislature.

1 Cases that cite this headnote

[2]

The objective of statutory interpretation is to discern the intent of the Legislature from the plain language of the statute.

3 Cases that cite this headnote

[3]

After reviewing the plain language of a statute, only if the legislative intent cannot be determined from the statute itself, may a court consult dictionary definitions.

5 Cases that cite this headnote

[4] **Criminal Law**
Discovery and disclosure

A defendant seeking DNA testing is required to present prima facie proof that the evidence sought to be tested is material to the issue of identity; in other words, the defendant must provide prima facie proof that there is some logical relationship between the evidence sought to be tested and the issue of identity. M.C.L.A. § 770.16(3)(a).

1 Cases that cite this headnote

[5] **Criminal Law**
Discovery and disclosure

Biological evidence contained on shorts and panties was linked to first degree criminal sexual conduct and perpetrator's identity and was therefore material, so as to support petition for DNA testing by persons convicted of felonies prior to January 8, 2001; victim was wearing these items of clothing when she was raped, and they were collected shortly after rape. M.C.L.A. § 770.16(3)(a).

2 Cases that cite this headnote

[6] **Criminal Law**
Discovery and disclosure

Biological evidence contained on quilt was linked to first degree criminal sexual conduct and perpetrator's identity and was therefore material, so as to support petition for DNA testing by persons convicted of felonies prior to January 8, 2001; rape took place on victim's bed, and quilt was on bed. M.C.L.A. § 770.16(3)(a).

2 Cases that cite this headnote

Attorneys and Law Firms

****486** Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, Stuart J. Dunnings III, Prosecuting Attorney, Susan L. LeDuc, Chief, Appellate Division, and Joseph B. Finnerty, Assistant Prosecuting Attorney, for the people.

Marla L. Mitchell–Cichon, Donna McKneelen, and William J. Fleener, Jr., Lansing, for the defendant.

Before: SAAD, C.J., and MURPHY and DONOFRIO, JJ.

Opinion

DONOFRIO, J.

***731** Defendant appeals by leave granted from a September 15, 2006, circuit court order denying his petition for the release and testing of biological evidence. Because the trial court improperly interpreted MCL 770. 16(3)(a) and erred when it denied defendant's request for biological testing, we reverse and remand for entry of an order granting defendant's request for DNA testing of biological materials pursuant to MCL 770.16.

***732** I

In October 1990, a jury found defendant guilty of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (use of force or coercion), and one count of breaking and entering an occupied dwelling with intent to commit a felony, MCL 750.110. The trial court sentenced defendant to 50 to 80 years' imprisonment. This Court affirmed defendant's convictions. *People v. Barrera*, unpublished memorandum opinion of the Court of Appeals, issued June 25, 1993 (Docket No. 135237).

In August 2006, defendant filed a petition for the release and testing of biological evidence pursuant to MCL 770.16. [1] Defendant's petition sought the following ****487** biological evidence to be tested: (1) a vaginal swab, (2) a vaginal smear, (3) "Area Three" on the quilt, (4) "Area Two" on the quilt, (5) shorts, and (6) panties. Defendant argued that the evidence should be subjected to DNA testing because

> [I]tems 1, 2, and 3 contain biological material left by the perpetrator of the crime. According to [one trial witness], a serologist at the [Michigan State Police] laboratory, these items contain sperm with the blood group substance belonging to a single donor with blood type O. [The victim] only had intercourse with two men: her husband and her attacker. [Her husband] is a blood type A secretor. Thus, the vaginal smear, vaginal slide and quilt, "Area Three," all with blood group substance belonging to a single donor with blood type O, must belong to the perpetrator. [Defendant] is a type O secretor and this evidence was used against him at trial. Items 4, 5, and 6 were consistent with the [husband's] blood type, but did not definitively exclude [defendant]. This evidence was also used against [defendant] ***733** at trial. The biological evidence is accordingly material to [defendant's] identity as the perpetrator of the crime.

The prosecutor opposed the testing, arguing that although defendant met all the conditions of MCL 770.16(3)(b), defendant could not make a prima facie showing that the evidence sought to be tested was material to the issue of his identity as the perpetrator of the crime under MCL 770.16(3)(a). In its memorandum of law in opposition to defendant's petition, the prosecution asserted, in part:

> We contend that the fingerprint evidence, the matching tattoos and the victim's firm in-court identification undercut the issue of the "materiality" of the blood evidence and, by implication, any DNA evidence.

In his reply brief, defendant argued that he had provided prima facie proof and that the prosecutor "failed to produce evidence or facts to negate the materiality of the biological evidence to the identity of the perpetrator of this crime."

At a hearing on defendant's petition, defendant's counsel argued that because the serologist testified that the biological evidence found was consistent with defendant, it constituted prima facie proof that the biological matter was material to defendant's identity as the perpetrator. Defense counsel further argued that the trial court needed to focus solely on the serological evidence and that nothing the prosecutor could present would directly undercut that evidence. Defense counsel gave examples of what would make the biological matter immaterial to identity, including a situation where a defendant argues consent, or where the serological evidence presented at trial already excluded a defendant.

The prosecutor argued that the other physical ***734** evidence, like the fingerprint, the tattoo identification, and the victim's identification, rebutted the prima facie showing of materiality.

The trial court stated that defendant was arguing, in essence, that materiality was equivalent to relevance, which would result in MCL 770.16(3)(a) being met "in every single case because in every single criminal case, evidence of identity is relevant." The trial court went on to adopt the prosecution's proposition that the standard for MCL 770.16(3)(a) materiality is "whether the biological evidence requested would provide a reasonable probability of a different result." After finding that it was appropriate to view more than just serological evidence, the trial court reviewed "all the evidence that goes to show identification of the perpetrator as the defendant." Thereafter, the trial court held as follows:

> ****488** Looking at all of the evidence that goes toward identification in this case in total, I cannot find that the defendant has presented a prima facie case that the requested biological evidence would provide a reasonable probability of a different result, and I'm denying the petition.

The trial court entered an order denying defendant's petition for the release and testing of biological evidence. Defendant filed a motion for reconsideration, arguing that the trial court's decision was contrary to the plain language of the statute and that the trial court's weighing of additional evidence was inappropriate. The trial court denied the motion for reconsideration, and defendant sought leave to file the instant appeal. This Court granted leave and this appeal followed.

II

Defendant argues that the trial court improperly interpreted MCL 770.16(3)(a) and erroneously concluded ***735** that the biological evidence was immaterial because other evidence in the case supported a finding of guilt. Defendant contends that the trial court incorrectly interpreted the meaning of the word " material" and, as a result, inappropriately held defendant to a higher standard than that of "prima facie proof" as required under MCL 770.16(3)(a). Defendant asserts that the trial court improperly engaged in the balancing test provided in MCL 770.16(7)(c) that applies only after the biological evidence has already been tested and the results show that the particular defendant has been excluded.

The prosecutor responds, arguing that defendant did not make a prima facie showing of the materiality of the evidence required by MCL 770.16(3)(a). The prosecutor asserts that inserting subsection 3(a) into the entirety of MCL 770.16 represents a threshold requirement that mandates the review of "the other evidence of identification." It is the prosecutor's position that reading MCL 770.16 otherwise improperly renders subsection 3(a) meaningless. The prosecutor stresses that other evidence including fingerprint and tattoo identification evidence and the victim's in-court identification, establishes that defendant's requested DNA testing fails to meet the threshold established under the plain language of MCL 770.16(3)(a).

III

[1] **[2]** "[T]he interpretation and application of statutes is a question of law that is reviewed de novo." *People v. Webb*, 458 Mich. 265, 274, 580 N.W.2d 884 (1998). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *People v. Williams*, 475 Mich. 245, 250, 716 N.W.2d 208 (2006). The objective of statutory interpretation is to discern the intent of the ***736** Legislature from the plain language of the statute. *People v. Sobczak–Obetts*, 463 Mich. 687, 694–695, 625 N.W.2d 764 (2001). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v. Morey*, 461 Mich. 325, 330, 603 N.W.2d 250 (1999). In doing so, we must be mindful that "[i]t is the role of the judiciary to interpret, not write, the law." *People v. Schaefer*, 473 Mich. 418, 430–431, 703 N.W.2d 774 (2005), clarified in part on other grounds *People v. Derror*, 475 Mich. 316, 320, 715 N.W.2d 822 (2006).

MCL 770.16(3) provides as follows:

> The court shall order DNA testing if the defendant does all of the following:
>
> (a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice ****489** to, the crime that resulted in the conviction.

(b) Establishes all of the following by clear and convincing evidence:

(*i*) A sample of identified biological material described in subsection (1) is available for DNA testing.

(*ii*) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.

(*iii*) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

A

[3] **[4]** At issue here is the meaning of the term "material" as used in MCL 770.16(3)(a). When a term is not ***737** expressly defined by statute, courts must first review the term in its proper context, giving every word or phrase of the statute its plain and ordinary meaning. MCL 8.3a; *People v. Thompson,* 477 Mich. 146, 151, 730 N.W.2d 708 (2007). MCL 8.3a also provides guidance:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

After reviewing the plain language of a statute, only if the legislative intent cannot be determined from the statute itself, may a court consult dictionary definitions. *People v. Peals,* 476 Mich. 636, 641, 720 N.W.2d 196 (2006). We need not consult a dictionary to determine the meaning of the term "material" as it is used in MCL 770.16(3)(a). The plain language of the statute requires a defendant seeking DNA testing to present "prima facie proof that the *evidence sought to be tested* is *material* to the issue of ... identity [.]" (Emphasis added.) It is self-evident that the use of the word "material" means that the "evidence sought to be tested" must be of some consequence to the issue of identity in the case. In other words, the defendant must provide prima facie proof that there is some logical relationship between the evidence sought to be tested and the issue of identity.

In the context of this case, "the evidence sought to be tested" is biological evidence described as traces of semen on: (1) a vaginal swab, (2) a vaginal smear, (3) "Area Three" on the quilt, (4) "Area Two" on the quilt, (5) shorts, and (6) panties. Pursuant to the plain language of MCL 770.16(3)(a), these items, or specimens from these items, would be tested for DNA matter ***738** if "material" to the perpetrator's identity. More specifically, if defendant demonstrates that the semen, and the resultant DNA evidence, is material to the crime and the perpetrator's identity, MCL 770.16(3)(a) is satisfied. In the instant case, defendant must show that all the items containing DNA matter he seeks to be tested are material to establishing the identity of the perpetrator of the rape. To do so, defendant must link the DNA-stained evidence to both the crime and the criminal.

Regarding the vaginal swab and the smear, because an emergency-room nurse collected the samples from the victim immediately after the crime was committed as part of the preparation of a rape kit, the specimens are directly linked to the crime and therefore the perpetrator's identity. But, let us consider an example where a vaginal swab and a smear were taken from a victim three months after the crime was committed or were taken during a routine ****490** gynecological medical visit the day before the crime occurred. In this example, the biological evidence would not be material to establishing the perpetrator's identity because any evidence contained could not be linked to the crime and the criminal.

[5] Turning to the shorts and the panties, the victim was wearing these items of clothing at the time she was raped and they were collected shortly after the rape. As such, the biological evidence contained on the shorts and the panties is linked to the crime and the perpetrator's identity and is therefore material. If we consider a hypothetical situation where the victim was not wearing the particular garments at or around the time of the rape, any biological evidence discovered on the garments would not be material to establishing the perpetrator's identity because any evidence contained could not be linked to the crime and the criminal. Hence, the ***739** "prima facie proof" requirement of MCL 770.16(3)(a) mandates that a defendant prove that there was evidence that the victim was wearing the garments at or around the time the victim was raped.

[6] The same analysis applies to the quilt. Here, the record shows that the rape took place on the victim's bed and the quilt was on the bed. Because the rapist or the victim came into contact with the quilt around the time of the rape, any DNA evidence left on the quilt is linked to the crime and the perpetrator's identity and is therefore material. However, the converse would destroy materiality. If there were no evidence tying the quilt to the crime scene at the relevant time, any DNA matter found on the quilt would not be material to the crime or to establishing the perpetrator's identity. Again, MCL 770.16(3)(a) requires a defendant to prove that there was evidence that the rapist or the victim came into contact with the quilt during or around the time of the rape.

After completing the analysis required under MCL 770.16(3)(a), we conclude that the DNA evidence testing defendant seeks is "material" to the question of the identity of the perpetrator of the rape and MCL 770.16(3)(a) is satisfied.

B

In denying defendant's petition, the trial court observed that reading MCL 770.16(3)(a) in this manner would compel trial courts to find that the "materiality" requirement of MCL 770.16(3)(a) is established in all cases "because in every single criminal case, evidence of identity is relevant." The trial court's conclusion ignores the interplay between MCL 770.16(3)(a) and MCL 770.16(3)(b). Our interpretation of MCL 770.16(3)(a) together with the plain language of ***740** MCL 770.16(3)(b) demonstrates that DNA evidence is not always material, thereby alleviating the concerns expressed by the trial court.

While MCL 770.16(3)(a) requires a defendant to link DNA evidence sought to be tested to both the crime and the criminal in order to show materiality, MCL 770.16(3)(b) addresses issues regarding the availability of the biological material, prior testing of the material, and whether identity was an issue at trial. MCL 770.16(3)(b)(*i*)-(*iii*). By way of example, if semen found on panties was material because the victim wore the panties at the time of the rape, MCL 770.16(3)(a) would be satisfied, but if a defendant had claimed at trial that he had consensual sex with the victim, identity would not be at issue. If identity is not at issue, then MCL 770.16(3)(b)(*iii*) is not satisfied, and DNA testing would not be ordered. Similarly, when a defendant's theory of the case is self-defense or where the biological evidence has already excluded a defendant, identity is not an issue. Although a defendant may satisfy the materiality requirement ****491** of MCL 770.16(3)(a), a defendant would not satisfy the "clear and convincing evidence" requirement of MCL 770.16(3)(b) on the issue of identity.

C

Instead of applying the plain language of MCL 770.16(3)(a) and simply determining whether defendant presented "prima facie proof that the evidence sought to be tested [wa]s material to the issue of ... identity[,]" the trial court impermissibly engaged in a balancing test. The trial court essentially concluded that defendant was sufficiently identified by the other physical evidence presented, and determined that DNA testing was immaterial. The trial court's interpretation and application of MCL 770.16(3)(a) improperly mixed ***741** the question whether the biological evidence is material with the issue whether the prima facie proof has been rebutted. But the plain language of the statute contains no language regarding presumptions and rebutting presumptions. Contrary to the trial court's conclusion, the term "material," as it is used in MCL 770.16(3)(a), does not in any way direct, or even allow, a trial court to engage in a balancing inquiry of the identifying evidence presented. A trial court's only responsibility under MCL 770.16(3)(a) is to determine if a defendant has presented "prima facie proof that the evidence sought to be tested is material to the issue of ... identity [.]" Doing otherwise is contrary to the plain language of the statute and does not further its purpose.

Additionally, the balancing test as employed by the trial court was premature. MCL 770.16 provides for this type of analysis to occur only *after* the biological evidence has been tested. Pursuant to MCL 770.16(6), if the DNA results are inconclusive or implicate defendant, no new trial must be held. Under MCL 770.16(7)(a)-(c), if the testing shows that defendant was not the source of the biological evidence, the trial court "shall ... hold a hearing to determine by clear and convincing evidence" that only the perpetrator could be the source of the genetic material, that the sample is not degraded or contaminated, and "[t]hat the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial." Thus, the trial court was not permitted to prematurely read the balancing-of-other-identification-evidence requirement into MCL 770.16(3)(a) when it properly belongs in MCL 770.16(7)(a)-(c). "The omission of a provision in one part of a statute that is included

in another should be construed as intentional, ***742** and provisions not included by the Legislature should not be included by the courts." *Polkton Charter Twp. v. Pellegrom*, 265 Mich.App. 88, 103, 693 N.W.2d 170 (2005) (citation omitted).

IV

Having determined that the biological evidence defendant sought to be tested was material because it was linked to the crime and the identity of the perpetrator, the only remaining question before us is whether defendant provided the requisite clear and convincing evidence under MCL 770.16(3)(b)(*i*)-(*iii*). On appeal, the prosecutor does not challenge that defendant met the requirements of MCL 770.16(3)(b)(*i*)-(*iii*). Rather, the prosecutor argues that the other physical evidence rebuts the materiality requirement of MCL 770.16(3)(a). The prosecutor's argument is without merit because MCL 770.16(3) does not allow for either the balancing or the consideration of conflicting evidence. MCL 770.16(3) only sets forth the foundational factors for a defendant's entitlement to DNA testing. Accordingly, it was error for the trial court to deny defendant's petition.

****492** V

The trial court improperly interpreted the plain language of MCL 770.16(3)(a) and, as a result, erred when it denied defendant's request for DNA testing of biological materials. Accordingly, we reverse and remand for entry of an order granting defendant's request for DNA testing of biological materials pursuant to MCL 770.16.

Reversed and remanded. We do not retain jurisdiction.

All Citations

278 Mich.App. 730, 752 N.W.2d 485

Footnotes

1 The statute applies to cases decided before January 8, 2001. MCL 770.16(1).

311 Mich.App. 296
Court of Appeals of Michigan.

PEOPLE
v.
POOLE (ON REMAND).

Docket No. 315982.
|
Submitted June 11, 2015, at Lansing.
|
Decided July 7, 2015, at 9:00 a.m.

Synopsis

Background: Petitioner, whose conviction for murder in the first degree was affirmed in an unpublished opinion on direct appeal to the Court of Appeals, sought to compel a search for, and DNA testing of, biological evidence. The Circuit Court, Oakland County, Rae Lee Chabot, J., denied petition. Petitioner sought leave to appeal. The Court of Appeals, 2014 WL 4347505, affirmed. Defendant sought leave to appeal. In lieu of granting such leave, the Supreme Court reversed and remanded.

Holdings: On remand, the Court of Appeals, Murphy, P.J., held that:

[1] materiality was not affected by the fact that blood-type evidence excluding defendant as a donor was already presented at trial, and

[2] it would be improper to deny DNA testing on the basis that a future motion for a new trial would be denied regardless of the results of any DNA testing.

Reversed and remanded with instructions.

West Headnotes (3)

[1] Criminal Law
Discovery and Disclosure

Materiality, as required for court to order post-conviction DNA testing of blood samples found on stones and grass at the crime scene, to the issue of defendant's identity as the perpetrator of murder was not affected by the fact that blood-type evidence excluding defendant as a donor was already presented at trial; all this scientific evidence was material to defendant's identity as the perpetrator, the somewhat cumulative nature of the evidence might have played a role in deciding a future motion for new trial, and the blood identified as being consistent with the victim's blood type might or might not have been defendant's blood, leaving open the possibility that another individual was involved in the crime. M.C.L.A. § 770.16(4)(a).

Cases that cite this headnote

[2] Criminal Law
Discovery and Disclosure

It would be improper to deny DNA testing to a defendant, who is serving a prison sentence for a felony conviction, on the basis that a future motion for a new trial would be denied regardless of the results of any DNA testing; court is not statutorily permitted to conflate the two phases of analysis of whether DNA testing should be ordered, and, if ordered, whether a motion for a new trial should be granted. M.C.L.A. § 770.16(8).

Cases that cite this headnote

[3] Criminal Law
Discovery and Disclosure

There are two phases of analysis for determining if a defendant is entitled to DNA testing: the first involves the court assessing whether DNA testing should be ordered, and the second entails, if DNA testing was ordered, whether a motion for new trial should be granted. M.C.L.A. § 770.16.

Cases that cite this headnote

Attorneys and Law Firms

Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Jessica R. Cooper, Prosecuting Attorney,

Thomas R. Grden, Appellate Division Chief, and Joshua J. Miller, Assistant Prosecuting Attorney, for the people.

The Thomas M. Cooley Innocence Project (by Marla Mitchell–Cichon, Donna McKneelen, and Cassandra M. Babel) for defendant.

Before: MURPHY, P.J., and SAWYER, J., and TALBOT, C.J.

ON REMAND

MURPHY, P.J.,

***2** Defendant petitioned the trial court under MCL 770.16 for an order directing DNA testing of biological material obtained by the police in their investigation of a 1988 murder for which defendant was convicted. The trial court denied the petition, concluding that simple blood-type evidence presented to the jury at defendant's criminal trial in 1989 had already excluded defendant as the source of collected blood samples, with one sample even producing a blood-type result unlinked to either defendant or the victim, yet defendant was still convicted by the jury. Therefore, according to the trial court, DNA testing would add nothing new for purposes of a retrial and simply confirm that defendant's blood was not present at the crime scene. We affirmed the trial court's decision, not on the merits, but on the basis of the law of the case doctrine in light of the case's procedural history in which prior comparable claims raised by defendant had been rejected in orders issued by this Court and the Michigan Supreme Court. Our Supreme Court then reversed our holding in an order, ruling that the law of the case doctrine did not apply, given that the previous appellate orders did not constitute decisions on the merits. *People v. Poole*, 497 Mich. 1022, 862 N.W.2d 652 (2015). The Supreme Court remanded the case to us for consideration of issues raised by defendant that were not addressed in our original opinion. We now reverse the trial court's ruling and remand for DNA testing.

The extensive history of this case was set forth in our prior opinion and, for ease of reference, we now quote that background here:

> Defendant was convicted of first-degree murder, MCL 750.316, in 1989 with respect to the slaying of Robert Mejia, whose body was found in a field in Pontiac on June 7, 1988. There was blood covering Mejia's shirt and pants. An autopsy revealed that he sustained eight stab wounds to the face, neck, and upper chest area. The depth of the wounds ranged from one-half inch to four inches. Mejia also sustained multiple superficial cuts and incised wounds, and he had abrasions and contusions on his arms and back, indicating that there had been a struggle. There was also a bite mark to his right arm. The coroner opined that Mejia had died approximately 48 hours before his body was discovered, plus or minus 12 hours.
>
> ***3** Witnesses identified defendant as leaving a bar with Mejia on the night of June 5, 1988. The case went unsolved for five months until defendant's then-girlfriend reported to authorities that he had confessed the killing to her. According to the girlfriend, on a Sunday evening in early June 1988, she and defendant had a fight about money, after which defendant said he was "going out to get some money" and then left. Defendant did not return until between 1:00 and 4:00 a.m. At that time, she noticed that defendant was "all scratched up and red in the face." When his girlfriend asked defendant what happened, he told her that he had been in a fight. At some point, defendant randomly stated to his girlfriend, "I killed somebody." He then explained that he had gone to the bar where witnesses had placed defendant and Mejia together. Defendant told his girlfriend that he talked with "a guy" in the bar and eventually left with him. According to the girlfriend, defendant recounted how he and the man went for a walk in the woods, where defendant "pulled a knife on the guy and told him to give him all of his money." A fight ensued "with a lot of biting and scratching, and pulling of hair." The girlfriend testified that defendant informed her that he then "held [the other man] down with his left hand and slit his throat and watched him drown in his own blood." Defendant's girlfriend did not initially believe defendant, but he "proved it" to her by retrieving a watch from his vehicle that was covered in dried blood.
>
> At trial, Melinda Jackson, an expert in forensic serology, testified that blood found on Mejia's clothing was type O, which matched Mejia's blood type. There was also evidence that some blood found on stones and grass connected to the crime scene was type O blood. Further, there was testimony presented at trial reflecting that defendant's blood type was AB, a type shared with only three percent of the population, and that none of the testable blood samples collected in relationship to the offense matched defendant's blood type. Additionally, a stone found in Mejia's pants had type A blood on it, which blood type matched neither Mejia nor defendant's blood.

Defendant appealed the conviction as of right, and this Court affirmed. *People v. Poole*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 1993 (Docket No. 120955). Our Supreme Court thereafter denied defendant's application for leave to appeal. *People v. Poole*, 442 Mich. 933 [503 N.W.2d 907] (1993).

On November 21, 2005, defendant filed a motion for new trial in the circuit court, relying, in part, on MCL 770.16. He also filed an accompanying motion for DNA testing pursuant to MCL 770.16. In the motions, defendant requested the DNA testing of biological material. The appeal currently before the panel also concerns DNA testing under MCL 770.16, which provided back in 2005 and still provides today that "a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction[.]" MCL 770.16(1); 2005 PA 4, 2008 PA 410, 2011 PA 212.

***4** In response to the 2005 motions filed by defendant in the circuit court, the prosecutor argued that the request for DNA testing did not satisfy the statutory requirements of MCL 770.16. MCL 770.16(3)(a) required a defendant to "[p]resent[ ] prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction." The language today is identical, except that it is found instead in MCL 770.16(4)(a) as a result of an amendment enacted pursuant to 2008 PA 410. MCL 770.16(3)(b)(*i*) provided that a defendant also had to establish, by clear and convincing evidence, that a "sample of identified biological material ... is available for testing." The identical language is currently found in MCL 770.16(4)(b)(*i*). See 2008 PA 410. The prosecutor argued that defendant failed to establish that biological material was available for testing and that, even if available, defendant could not show that such evidence was material to defendant's identity as the perpetrator, as the blood-typing evidence presented at trial already established that defendant's blood was not found in connection with the criminal investigation. In a supplement to the prosecutor's response brief to defendant's 2005 motions, the prosecution stated that it had now been "informed by Ms. Melinda Jackson of the Michigan State Police that some blood sample evidence involved in the Defendant's case has been preserved. The People instructed Ms. Jackson to continue to preserve those samples." The prosecution, however, still maintained that defendant was not entitled to relief under MCL 770.16.

On August 1, 2006, the circuit court, the Honorable Edward Sosnick presiding, treated defendant's motions as motions brought under MCR 6.501 *et seq.* (post-appeal relief), denied defendant's DNA-related requests, and found that defendant failed to establish that biological material was available for testing. Moreover, the circuit court ruled:

> Even if the defendant established that such biological material existed, the defendant could not meet the requirements of MCL 770.16(3)(a) [now § 16(4)(a)] that such evidence was material to the defendant's identity as the perpetrator of the murder of Robert Mejia. Evidence presented during this defendant's trial already established that the defendant's blood [type] was not found on the victim. There is no other suspect to attempt to match with DNA testing. The defendant has not, therefore, satisfied the requirements of MCL 770.16(3).

Defendant then filed with this Court in Docket No. 276973 a delayed application for leave to appeal, along with an accompanying motion to remand for DNA testing pursuant to MCL 770.16. In the application, defendant argued that, as acknowledged by the prosecutor below, biological material was available for DNA testing. Defendant also argued to this Court that, pursuant to MCL 770.16, he was entitled to DNA testing of all biological evidence presented at the trial, given that DNA testing could significantly undermine the prosecutor's theory relative to defendant's guilt. In the motion to remand for DNA testing, defendant referenced the following evidence collected by police: blood on the victim's fingernails; blood from a sample of the shirt worn by the victim; blood on a stone recovered from the victim's clothing; loose hair found on the victim; and blood on the console of defendant's car. The motion stated, "The Cooley Law School has discovered that there is DNA biological material available for testing. Exhibit G."

***5** This Court denied defendant's delayed application "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Poole*, unpublished order of the Court of Appeals, entered October 23, 2007 (Docket No. 276973). In that same order, the panel denied defendant's motion to remand for DNA testing. *Id.* The Michigan Supreme Court then denied defendant's application for leave to appeal, ruling that "defendant

has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Poole*, 480 Mich. 1186 [747 N.W.2d 275] (2008). The Court also denied the motion for DNA testing. *Id.* On July 10, 2008, defendant filed a petition for a writ of *habeas corpus* in federal court, seeking in part DNA testing pursuant to 18 USC 3600. The petition was denied. *Poole v. Woods*, unreported opinion of the United States District Court for the Eastern District of Michigan, issued September 28, 2011 (Docket No. 08–12955) [2011 WL 4502319]. The case was then unsuccessfully appealed to the Sixth Circuit and eventually to the United States Supreme Court, which denied certiorari. *Poole v. Mackie*, —— U.S. ——, 134 S.Ct. 945, 187 L.Ed.2d 811 (2014).

While the federal effort was pending in the Sixth Circuit, defendant, on November 2, 2012, filed the instant petition in the circuit court, seeking an order, once again, to test for biological evidence pursuant to MCL 770.16. In the petition, defendant stated that the police had confirmed that they held "bloody stones and known samples from the victim and [defendant]." We note that documents in the record dating back to 1988 reflected that stones bearing suspected blood had been collected from the crime scene. Defendant asserted that while the stones and other samples were subjected to blood-type testing, they had not been subjected to DNA testing. Defendant also maintained that the evidence was material to establishing the identity of the perpetrator. Further, defendant requested DNA testing of other biological evidence previously collected by police. There is no indication that the facts had changed or that any new evidence had been located or discovered since the earlier failed attempt to obtain an order for DNA testing. The circuit court, the Honorable Rae Lee Chabot presiding, rejected the petition, finding, much like Judge Sosnick had several years earlier, that the jury had been fully aware that defendant was not the source of any crime-scene blood, given the blood-type evidence, yet the jury still convicted defendant. DNA testing excluding defendant as a donor would therefore add nothing of relevance if a new trial took place. This Court then granted defendant's application for leave to appeal. *People v. Poole*, unpublished order of the Court of Appeals, entered November 25, 2013 (Docket No. 315982). [*People v. Poole*, unpublished opinion per curium of the Court of Appeals, issued September 2, 2014 (Docket No. 315982), pp. 1–4 [2014 WL 4347505] (alterations in original).]

***6** We proceeded to hold that the law of the case doctrine precluded consideration of defendant's latest efforts under MCL 770.16. *Id.* at 4–5. However, our Supreme Court concluded that the earlier orders issued by this Court and the Supreme Court, which provided that defendant had failed "to meet the burden of establishing entitlement to relief," [1] and which denied his request for any DNA testing, did not constitute "law of the case," because the orders "were not rulings on the merits of the issues presented." *Poole*, 497 Mich. 1022, 862 N.W.2d 652.

Given the Supreme Court's directives in the remand order that "no provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material" and that we are to address "the issues raised by the defendant," *id.*, we will set aside our concerns that, perhaps, MCL 770.16 does not allow for multiple petitions regarding the same evidence or that the court rules regarding motions under Subchapter 6.500 (concerning postappeal relief) might be applicable and bar relief. See MCL 770.16(8) (referring to MCR 6.505); MCR 6.501 ("Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7. 200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter."); MCR 6.502(G)(1) and (2) (stating that only one motion for relief from judgment may be filed except for situations involving certain retroactive changes in the law or newly discovered evidence); MCR 6.508(D)(2) (stating that a court generally cannot grant relief if the defendant's motion alleges grounds that were previously rejected in an MCR 6.500 proceeding). [2]

Turning to the substance or merits of defendant's petition under MCL 770.16, we conclude: (1) that, in satisfaction of § 16(1), defendant was convicted of a felony at trial before January 8, 2001, and is currently serving a prison sentence for the conviction; (2) that, in satisfaction of § 16(2), defendant's petition was filed in the sentencing court before January 1, 2016; (3) that, in satisfaction of § 16(3), biological material was collected and identified during the police investigation of defendant's case; (4) that, in satisfaction of § 16(4)(a), defendant presented prima facie proof that the biological evidence sought to be tested was material to the question of defendant's identity as the perpetrator of the murder; (5) that, in satisfaction of § 16(4)(b)(*i*), there is clear and convincing evidence that a sample of biological material is indeed available for DNA testing; (6) that, in satisfaction of § 16(4)(b)(*ii*), there is clear and convincing evidence that the biological material was not previously subjected to DNA testing; and (7) that, in satisfaction of § 16(4)(b)(*iii*), there is

clear and convincing evidence that defendant's identity as the perpetrator was at issue during his trial. When all these factors are satisfied, as we have concluded, "[t]he court *shall* order DNA testing[.]" MCL 770.16(4) (emphasis added). Of the factors subject to consideration, the only point of contention below and on appeal concerns § 16(4)(a) and whether the blood samples sought to be tested are material to the issue of defendant's identity as the perpetrator of Mejia's murder. [3]

***7** In *People v. Barrera*, 278 Mich.App. 730, 737, 752 N.W.2d 485 (2008), this Court construed the language in § 16(4)(a), which at that time was found in § 16(3)(a), [4] holding that biological evidence "must be of some consequence to the issue of identity" or, stated differently, that there must be "some logical relationship between the evidence sought to be tested and the issue of identity." According to the *Barrera* panel, the language in § 16(4)(a) "requires a defendant to link DNA evidence sought to be tested to both the crime and the criminal in order to show materiality...." *Id.* at 740, 752 N.W.2d 485.

In this case, at issue is blood found on stones and grass located at the crime scene. [5] With respect to blood typing, all that is known is that nearly all of the blood was consistent with the victim's blood type, none of the blood matched defendant's blood type, and that one blood sample—a blood stain on a stone found in the victim's pants—matched neither defendant's nor the victim's blood type. [6] If one removes from consideration the fact that blood-type testing was performed on the evidence and that the results were submitted to the jury, there would appear to be no dispute whatsoever that the blood samples would be material to defendant's identity as the perpetrator. The "materiality" would be established from the evidence showing a violent physical attack involving a knife and an ensuing struggle that could have easily resulted in the perpetrator being cut or scratched, thereby spilling some of the perpetrator's own blood in the process of the killing. [7] A finding of "materiality" would further be supported by the evidence showing the nature, location, and extent of the victim's injuries and that the blood samples were found all about the crime scene and in the victim's pocket.

[1] Under our scenario, [8] DNA testing could be inconclusive, could point to defendant as being a donor, or could exclude defendant as the source of any blood samples, along with potentially identifying another specific individual as the donor, thereby clearly satisfying MCL 770.16(4)(a). Because DNA testing of a blood sample could possibly connect another person to the crime scene or exclude defendant, the sample would be of some consequence or have a logical relationship to the issue of identity and would be linked to both the crime and the criminal. In other words, the blood samples would necessarily be material to defendant's identity as the perpetrator.

The difficulty that arises in this case concerns whether the question of materiality under § 16(4)(a) is affected by the fact that a trial was conducted in which the jury was presented with blood-type evidence that effectively excluded defendant as the source of the blood samples. The prosecution argues that the crime-scene blood samples, for purposes of DNA testing, are not material to the issue of defendant's identity as the perpetrator, considering that blood typing already excluded defendant as the donor of the blood samples. Similarly, the trial court noted that the jury had been fully aware that defendant was not the source of any of the blood, with one sample even producing a blood-type result unlinked to either defendant or the victim, yet the jury still convicted defendant. The court therefore opined that any DNA testing that excluded defendant as a donor would add nothing of relevance in a new trial.

***8** Because the trial court was a bit vague in its statements, we are not quite certain regarding the court's underlying reasoning within the context of § 16. On one hand, the trial court may have been concluding that, in regard to the analysis under § 16(4)(a), any "materiality" of the blood samples at this stage had been entirely undercut or lost in light of the history of the case and the prior presentation of blood-type evidence to the jury. Stated otherwise, perhaps the trial court found that the blood samples, for purposes of DNA testing, are immaterial under § 16(4)(a), considering the blood-type evidence submitted at trial that already excluded defendant. On the other hand, or in conjunction with the preceding observation, the trial court may have jumped ahead in the analysis under MCL 770.16(7) and (8), as we shall now explain. If a trial court orders DNA testing, MCL 770.16(7) and (8) contemplate two broad possible results. When "the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material," the trial court is required to "deny the motion for new trial." MCL 770.16(7). MCL 770.16(8) controls when "the results of the DNA testing show that the defendant is not the source of the identified biological material...." Absent a mistake with respect to the blood typing, any DNA testing done in this case should result in the application of Subsection (8). But Subsection (8), even when implicated, only allows for

a new trial upon a hearing and the presentation of clear and convincing evidence showing that only the perpetrator could have been the source of the identified biological material, showing that the biological material was not contaminated or seriously degraded, and showing "[t]hat the defendant's purported exclusion...., balanced against the other evidence in the case, is sufficient to justify the grant of a new trial." MCL 770.16(8)(a) through (c). The trial court's ruling here may have simply reflected its conclusion that, assuming the expected exclusion of defendant as a donor upon any DNA testing, no new trial would be warranted or justified, because defendant already had a trial in which the jury knew that defendant had been excluded.

[2] **[3]** To the extent that the trial court took the latter approach, jumping ahead and contemplating § 16(7) and (8), this was error. MCL 770.16 envisions two main phases; the first phase involves the court assessing whether DNA testing should be ordered, and the second phase entails, if DNA testing was ordered, whether a motion for new trial should be granted. Here, we are solely concerned with the first phase. As indicated earlier, if a defendant satisfies the required factors with respect to the question whether DNA testing should be ordered, "[t]he court *shall* order DNA testing[.]" MCL 770.16(4) (emphasis added). Accordingly, it would be improper to deny DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing. A court is not statutorily permitted to conflate the two phases of analysis.

***9** To the extent that the trial court found that the blood samples, for purposes of DNA testing, are immaterial under § 16(4)(a), given the blood-type evidence submitted to the jury at trial, the trial court also erred. We initially conclude that the materiality of the blood samples to the issue of identity is not affected or lessened by the fact that blood-type evidence excluding defendant as a donor was already presented at trial; all of this scientific evidence is material or relevant to defendant's identity as the perpetrator. Rather, the somewhat cumulative nature of the evidence may possibly play a role in deciding a future motion for new trial. Furthermore, if accurately tested, the blood identified as being consistent with the victim's blood type may or may not have been his blood, considering that other people have type O blood, and it was not defendant's blood, leaving open the possibility that another individual was involved in the crime. The blood identified as being inconsistent with both the victim and defendant's blood type, if accurately tested, also suggests the possibility that another individual was involved in the crime. Although it is true that both blood-type results and prospective DNA results might equally exclude defendant as being the donor of the blood samples found at the crime scene, the fact is that DNA evidence and blood-type evidence are not typically of equal value. In this case, we see a distinction between the jury knowing in a broad general sense that the blood of an unknown person was present at the crime scene and the jury potentially learning through DNA testing that the blood *of a particular person*, perhaps an acquaintance of the victim or a person who was in the bar that night, could be linked to the crime scene. Reasonable doubt would more likely flow from the identification of a specific individual, especially if the person was present in the area at the time of the murder, as opposed to a wholly unknown figure. [9] We cannot conclude that the blood samples, for purposes of DNA testing, are immaterial merely because the jury in the 1989 trial considered blood-type evidence that excluded defendant as a donor or source of the blood samples. DNA testing is justified because, under the circumstances, there exists prima facie proof that the blood samples, which will be subjected to DNA testing, are material to defendant's identity as the perpetrator, given that the DNA testing could point to another specific individual as the perpetrator.

Finally, as relied on by the trial court and prosecution, it is necessary to address a statement in *Barrera* indicating that "where ... biological evidence has already excluded a defendant, identity is not an issue." *Barrera*, 278 Mich.App. at 740, 752 N.W.2d 485. To give the proper context to the statement, the full paragraph in which the statement is embedded must be examined:

> While MCL 770.16(3)(a) [now (4)(a)] requires a defendant to link DNA evidence sought to be tested to both the crime and the criminal in order to show materiality, MCL 770.16(3)(b) [now (4)(b)] addresses issues regarding the availability of the biological material, prior testing of the material, and whether identity was an issue at trial. MCL 770.16(3)(b)(*i*)–(*iii*) [now (4)(b)(*i*)–(*iii*)]. By way of example, if semen found on panties was material because the victim wore the panties at the time of the rape, MCL 770.16(3)(a) would be satisfied, but if a defendant had claimed at trial that he had consensual sex with the

> victim, identity would not be at issue. If identity is not at issue, then MCL 770.16(3)(b)(*iii*) is not satisfied, and DNA testing would not be ordered. Similarly, when a defendant's theory of the case is self-defense *or where the biological evidence has already excluded a defendant, identity is not an issue.* Although a defendant may satisfy the materiality requirement of MCL 770.16(3)(a), a defendant would not satisfy the "clear and convincing evidence" requirement of MCL 770.16(3)(b) on the issue of identity. [*Barrera,* 278 Mich.App. at 740, 752 N.W.2d 485 (emphasis added).]

***10** As gleaned from this passage, the emphasized statement at issue, which is indisputably dicta and unconfined by specific facts, was being discussed in the context of § 16(3)(b)(*iii*), now § 16(4)(b)(*iii*), and not the materiality provision in § 16(4)(a) that we have been discussing at length in this opinion. MCL 770.16(4)(b)(*iii*) requires clear and convincing evidence that "[t]he identity of the defendant as the perpetrator of the crime was at issue during his or her trial." Accordingly, in the examples given by this Court—consensual sex, self-defense, and the existence of exclusionary evidence—the underlying implicit premise was that identity was not at issue or disputed by the parties at trial. Therefore, with respect to the hypothetical scenario in which the biological evidence had already excluded a defendant, the *Barrera* panel was necessarily envisioning circumstances in which there was exclusionary evidence *and in light of this evidence the parties did not dispute identity*. Such was not the case here, considering that the whole trial focused on the disputed issue of the identity of the perpetrator, alleged by the prosecutor to be defendant, notwithstanding the blood-type evidence excluding defendant as a source of the blood. The *Barrera* dicta has no bearing on our analysis.

Reversed and remanded for entry of an order directing DNA testing under MCL 770.16(6). We do not retain jurisdiction.

SAWYER, J., and TALBOT, C.J., concurred with MURPHY, P.J.

All Citations

--- N.W.2d ----, 311 Mich.App. 296, 2015 WL 4094486

Footnotes

1 *Poole,* unpub. order of the Court of Appeals, entered October 23, 2007 (Docket No. 276973); *Poole,* 480 Mich. 1186, 747 N.W.2d 275.

2 As reflected in the quoted language from our previous opinion, defendant's earlier efforts to obtain DNA testing of the same biological material under MCL 770.16 were addressed by the trial court, this Court, and our Supreme Court in the context of Subchapter 6.500.

3 Section 16(4)(a) requires a defendant to "[p]resent[ ] prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction."

4 See 2000 PA 402, 2005 PA 4, and 2008 PA 410.

5 We note that defendant had also requested an order directing authorities to search for and collect other evidence containing or possibly containing biological material that could be subjected to DNA testing, e.g., a cigarette butt, the victim's fingernail clippings, a blood-stained car console. This issue formed the basis of defendant's second argument on appeal; however, after the appeal was filed the parties entered into a stipulation "that there is no additional biological evidence to be located in this case and that the second issue ... is moot." Accordingly, our focus is solely on the blood samples found on the stones and grass at the crime scene.

6 Expert Melinda Jackson did testify that there were inconclusive results in regard to some of the blood samples because they did not contain sufficient quantities of material for testing.

7 There was evidence that the victim had sustained multiple superficial cuts and incised wounds, along with abrasions and contusions on his arms and back, as well as a bite mark to the back of his right arm, which all suggested that the victim and the perpetrator had engaged in a violent physical struggle before the victim was finally incapacitated and died.

8 Again, for the moment, we are assuming that there was no blood-type testing performed or blood-type results presented to the jury.

9 We do appreciate that DNA testing might not produce the identity of the donor.

307 Mich.App. 485
Court of Appeals of Michigan.

PEOPLE
v.
WOOD.

Docket No. 315379.
|
Submitted Oct. 14, **2014**, at Detroit.
|
Decided Oct. 28, **2014**, at 9:05 a.m.

Synopsis

Background: Defendant was convicted following jury trial in the Circuit Court, Oakland County, Colleen A. O'Brien, J., of alternative counts of premeditated murder in the first degree and felony murder, larceny in a building, and other charges. Defendant appealed.

Holdings: The Court of Appeals, Boonstra, P.J., held that:

[1] other-acts evidence of defendant's thefts was admissible;

[2] court did not abuse its discretion in denying motion for a mistrial on the basis of alleged prosecutorial misconduct in vouching for accomplice's testimony;

[3] DNA test results of Y-chromosome short tandem repeats were admissible;

[4] expert was unavailable, and, thus, admission of her preliminary examination testimony did not violate defendant's Confrontation Clause rights;

[5] any error in admission of police officer's lay opinion that a knife in evidence constituted the same one that defendant had used to kill victim was not plain error; and

[6] any error in suppression of DNA tests conducted seven months after the murder was not plain error.

Affirmed.

West Headnotes (30)

[1] Criminal Law
Homicide, mayhem, and assault with intent to kill
Criminal Law
Homicide, mayhem, and assault with intent to kill
Criminal Law
Other particular offenses

Other-acts evidence of defendant's thefts was admissible in prosecution for murder in the first degree and larceny in a building, where the other thefts tended to make it more likely than not that defendant intended to commit larceny from victim's house, defendant carried a baseball bat inside victims's house and tied them up, placed them in the basement, and set their houses ablaze, which tended to make it more likely than not that defendant either intended to kill or inflict great bodily harm on victims, evidence showed the existence of a common plan, scheme, or system, and the bulk of the other acts also shared several common features with the offenses in the instant case. Mich. R. Evid. 404(b)(1).

Cases that cite this headnote

[2] Criminal Law
Review De Novo
Criminal Law
Reception and Admissibility of Evidence

Court of Appeals reviews for an abuse of discretion a trial court's ruling on the admission of evidence; however, it reviews de novo preliminary legal issues regarding admissibility.

Cases that cite this headnote

[3] Criminal Law
Purposes for Admitting Evidence of Other Misconduct
Criminal Law
Relevancy

Criminal Law
Prejudicial effect and probative value

Evidence of a defendant's other acts or crimes is admissible if: (1) the prosecution offers the evidence for a proper purpose; (2) the other-acts evidence satisfies the definition of logical relevance; and (3) any unfair prejudice arising from the admission of the other-acts evidence does not substantially outweigh its probative value. Mich. R. Evid. 404(b)(1).

Cases that cite this headnote

[4] **Criminal Law**
Limiting effect of evidence of other offenses

On request, the trial court can read the jury a limiting instruction that describes the proper consideration of the other-acts evidence. Mich. R. Evid. 404(b)(1).

2 Cases that cite this headnote

[5] **Criminal Law**
Proof and Effect

Without analyzing admissibility under rule governing admission of other acts evidence, a court may admit evidence of other criminal acts when it explains the circumstances of the crime. Mich. R. Evid. 404(b).

Cases that cite this headnote

[6] **Criminal Law**
Homicide, mayhem, and assault with intent to kill

Criminal Law
Homicide, mayhem, and assault with intent to kill

Criminal Law
Other particular offenses

Danger of unfair prejudice, confusion of the issues, or misleading the jury did not substantially outweigh the probative value of other-act evidence of defendant's thefts in prosecution for murder, where the other-act evidence tended to make it more likely than not that defendant intended to commit larceny from victim's house, defendant carried a baseball bat inside victims's house and tied them up, placed them in the basement, and set their houses ablaze, which tended to make it more likely than not that defendant either intended to kill or inflict great bodily harm on victims, evidence showed the existence of a common plan, scheme, or system, and the bulk of the other acts also shared several common features with the offenses in the instant case. Mich. R. Evid. 403, 404(b).

Cases that cite this headnote

[7] **Criminal Law**
Credibility of other witnesses

Criminal Law
Comments on evidence or witnesses

Trial court did not abuse its discretion in denying defendant's motion for a mistrial on the basis of alleged prosecutorial misconduct in vouching during opening statement for accomplice's credibility in prosecution for murder in the first degree and larceny in a building, where prosecutor's reference to accomplice's plea agreement did not embody an inappropriate suggestion that the government had some special knowledge, not known to the jury, that the accomplice was testifying truthfully, and even if the prosecutor's statements were improper, the trial court's instructions, which emphasized that the prosecutor's opening statement was not evidence and that the jury alone had the responsibility to determine witness credibility, cured any potential prejudice.

Cases that cite this headnote

[8] **Criminal Law**
Arguments and conduct of counsel

Court of Appeals reviews claims of prosecutorial misconduct on a case by case to determine whether the defendant received a fair and impartial trial.

Cases that cite this headnote

[9] **Criminal Law**

Issues related to jury trial

Court of Appeals reviews for an abuse of discretion a trial court's decision regarding a motion for a mistrial.

Cases that cite this headnote

[10] Criminal Law

Credibility and Character of Witnesses; Bolstering

A prosecutor may not vouch for the credibility of his or her witnesses to the effect that the prosecutor has some special knowledge concerning a witness's truthfulness; however, merely by calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the government does not insinuate possession of information not heard by the jury, and the prosecutor cannot be taken as having expressed his personal opinion on a witness's veracity.

Cases that cite this headnote

[11] Criminal Law

Particular tests or experiments

DNA test results of Y–chromosome short tandem repeats, which were short DNA sequences that were repeated numerous times in a particular area of a Y–chromosome, were admissible in prosecution for murder, where expert, who was a senior DNA analyst, testified that approximately 2,000 peer reviews of Y–chromosome short tandem repeats had documented its general acceptance as reliable within the scientific community, and laboratory supervisor testified that the likelihood of observing the same short tandem repeats in biological samples from victim and scarf that bound her was at least 1 in 1,005. Mich. R. Evid. 702.

1 Cases that cite this headnote

[12] Criminal Law

Competency of witness

Criminal Law

Admissibility

Court of Appeals reviews for an abuse of discretion a trial court's qualification of an expert witness and its ultimate ruling regarding whether to admit expert testimony. Mich. R. Evid. 702.

4 Cases that cite this headnote

[13] Criminal Law

Basis of Opinion

A trial court may admit expert testimony only once it ensures that the evidence meets the reliability standard. Mich. R. Evid. 702.

1 Cases that cite this headnote

[14] Criminal Law

Experiments and Tests; Scientific and Survey Evidence

Criminal Law

Necessity and sufficiency

When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its error rate if known and the existence and maintenance of standards controlling the technique's operation. Mich. R. Evid. 702.

Cases that cite this headnote

[15] Criminal Law

Necessity and sufficiency

Rule governing admission of expert testimony mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data; thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise such as medicine. Mich. R. Evid. 702.

Cases that cite this headnote

[16] Criminal Law

Necessity and sufficiency

The proponent for the admission of expert testimony must show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. Mich. R. Evid. 702.

Cases that cite this headnote

[17] Criminal Law

Subjects of Expert Testimony

Criminal Law

Necessity and scope of proof

The trial court need not admit only evidence that is unassailable or investigate whether an expert's opinion is necessarily correct or universally accepted. Mich. R. Evid. 702.

Cases that cite this headnote

[18] Criminal Law

Testimony at preliminary examination, former trial, or other proceeding

Expert in DNA analysis, who testified at defendant's preliminary examination, but was on bed rest as a result of pregnancy complications, was not available to testify at murder trial, and, thus, admission of her preliminary examination testimony did not violate defendant's Confrontation Clause rights, where defendant had ample opportunity to cross-examine expert during joint preliminary examination at which witness testified on the very charges for which defendant stood trial, there was no indication that court limited defendant's opportunity to cross-examine expert, and court admitted the cross-examinations as well. U.S.C.A. Const.Amend. 6; Mich. R. Evid. 804(a)(4).

3 Cases that cite this headnote

[19] Criminal Law

Sufficiency in general

Jury instructions that closely mirrored standard accomplice instructions did not improperly bolster accomplice's testimony in murder trial, although they contained language regarding accomplice's plea agreement being premised on her truthful testimony, where the instructions did not state or suggest that accomplice had offered truthful testimony, but only that the prosecution had agreed to pursue a lesser charge if she offered truthful testimony and that the prosecution remained free to alter the plea agreement if it obtained additional evidence against accomplice.

Cases that cite this headnote

[20] Criminal Law

Instructions

Defendant waived on appeal any claim of error regarding the jury instructions when his counsel affirmatively approved the instructions.

Cases that cite this headnote

[21] Criminal Law

Duty of judge in general

A criminal defendant has the right to have a properly instructed jury consider the evidence against him.

Cases that cite this headnote

[22] Criminal Law

Construction and Effect of Charge as a Whole

Court of Appeals reviews jury instructions as a whole to determine whether error requiring reversal occurred.

Cases that cite this headnote

[23] Criminal Law

Necessity of instructions

Criminal Law

Elements and Incidents of Offense, and Defenses in General

The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses, or theories that the evidence supports.

Cases that cite this headnote

[24] **Criminal Law**
Duty of judge in general
Criminal Law
Requisites and sufficiency

Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights.

Cases that cite this headnote

[25] **Criminal Law**
Opinion evidence

Any error in admission of police officer's lay opinion that a knife in evidence constituted the same one that defendant had used to kill victim and discarded onto median was not plain error in murder prosecution, where several officers all testified to the effect that knife recovered from the median was the same knife that had been stolen, was shown to accomplice by defendant before he returned to victim's bedroom, and defendant told accomplice that he used the knife to cut and stab victim's throat.

Cases that cite this headnote

[26] **Criminal Law**
Exclusion of evidence

Any error in suppression of DNA tests conducted seven months after the murder was not plain error in prosecution for murder, where defendant identified nothing tending to establish that the evidence was exculpatory, that he could not have possessed it with reasonable diligence, the prosecution suppressed it, or that a reasonable probability existed that the disclosure of the evidence might have altered the outcome of his trial.

Cases that cite this headnote

[27] **Constitutional Law**
Evidence

Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[28] **Criminal Law**
Constitutional obligations regarding disclosure

To establish a *Brady* violation, a defendant must prove that: (1) state possessed evidence favorable to the defendant; (2) defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Cases that cite this headnote

[29] **Criminal Law**
Best and secondary and demonstrative evidence

Any error in mishandling, contamination, or chain of custody of DNA evidence was not plain error in prosecution for murder, where defendant did not establish any factual support for his arguments concerning the mishandling of evidence.

Cases that cite this headnote

[30] **Searches and Seizures**
Particular concrete applications

Defendant lacked standing to challenge a violation of accomplice's Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

Attorneys and Law Firms

****10** Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Jessica R. Cooper, Prosecuting Attorney, Thomas R. Grden, Chief, Appellate Division, and Matthew A. Fillmore, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, PC, Lansing (by Michael A. Faraone), Jonathan B.D. Simon, Bloomfield Hills, and Alan C. **Wood**, in propria persona, for defendant.

****11** Before: BOONSTRA, P.J., and MARKEY and KIRSTEN FRANK KELLY, JJ.

Opinion

BOONSTRA, P.J.

***489** Defendant appeals by right his convictions on alternative counts of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b); one count of larceny in a building, MCL 750.360; and two counts of possessing, retaining, secreting, or using a financial transaction device, MCL 750.157n(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of life in prison without parole for one count of first-degree murder supported by two theories, 46 months to 15 years for the larceny conviction, and 34 months to 15 years for each financial-transaction-device conviction. [1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant was convicted of killing 80–year–old Nancy Dailey and stealing her credit cards from her home on November 20, 2011. The prosecution had charged Tonia Michelle Watson as a codefendant with first-degree felony murder, larceny in a building, and stealing a financial transaction device. On December 21, 2012, Watson pleaded guilty of second-degree murder, MCL 750.317, larceny in a building, and unlawfully taking a financial transaction device. Watson testified against defendant at trial.

On November 20, 2011, Dailey's cousin—Leah Storto—and a neighbor—whom Storto identified as Steve—discovered Dailey's lifeless body and called 911. Police officers who arrived at Dailey's home described ***490** finding different areas of the home ransacked and her body bound and bloody in her bedroom. The autopsy revealed bruising on Dailey's face, neck, chest, and upper right back, the back of her left hand, her left wrist, and one of her ears; bruising and linear scrapes near her neck; "multiple sharp force injuries ... consist[ing] of a [7– to 8–inch] stab wound on the right side of the neck" that severed Dailey's carotid artery and jugular vein and a 5–inch " slashing wound in front of the neck"; "a small nick on [Dailey's] left thumb"; and "some petechiae [pinpoint hemorrhages] on [her] cheeks, forehead and in the lower [eye]lids," which often appear in instances of ligature or manual strangulation. Her death was ruled a homicide.

Another of Dailey's neighbors, Lois Hillebrand, identified defendant at trial as the man who had approached her on a Saturday in early November 2011 about raking her leaves and whom Hillebrand saw raking Dailey's leaves the next day. Another neighbor, Marie Heshczuk, testified that a couple of weeks before Dailey's death, she saw a white man and a white woman raking leaves in Dailey's front yard and the man "highly resemble[d]" defendant. She also testified that while outside raking the leaves of her neighbor directly across the street from Dailey's house on November 20, 2011, she saw Dailey through her front window between 5:00 and 5:30 p.m., and also noticed an unfamiliar man walking past Dailey's house wearing a dark hooded sweatshirt and dark pants. Another witness, Michael Wilson, identified defendant as a man he saw in an alley near Dailey's house at 5:30 p.m. on November 20, 2011.

A. WATSON'S TESTIMONY CONCERNING DAILEY'S MURDER

Watson testified about her participation with defendant in Dailey's killing. Watson ****12** identified defendant in ***491** court as her boyfriend since November 2010. Watson also testified that she had regularly used cocaine and heroin for 25 years and that during her relationship with defendant, he regularly used marijuana and cocaine. Watson recalled that she and defendant met Dailey in early November 2011, when Dailey paid them $40 for raking leaves in her yard.

According to Watson, she and defendant were homeless in November 2011, struggling to pay for drugs and food, and living in different hotels or motels, primarily the Seville Motel on Woodward Avenue in Royal Oak south of Twelve Mile Road, but also at other lodging on Woodward Avenue, including the De Lido Motel south of Eight Mile Road. Watson testified that on November 20, 2011, she and defendant had checked out of their hotel because they

"didn't have any money" and spent the day at a McDonald's restaurant located at Woodward Avenue and Thirteen Mile Road.[2] According to Watson, defendant raised the idea of robbing Dailey, and she concurred in this idea because of their dire financial straits. Watson testified that they left the restaurant, waited until dark, walked toward Dailey's house, "walked around the block a couple of times," noticed Dailey inside, and ascertained that a door was unlocked. Defendant then entered a side door and told Watson to go inside.

Watson testified that defendant told Dailey "that this was a robbery." Defendant took from Dailey's living room a passport and a cellular phone; Watson took Dailey's purse and removed some money. After Dailey ***492** voiced a desire to use the bathroom, defendant instructed Watson to stand outside the open bathroom door, and Watson asked Dailey to give defendant "the ATM numbers to the credit cards"; defendant then searched Dailey's bedroom for valuables. When Dailey tried closing the bathroom door, defendant grabbed Dailey's hair, threw her to the ground, and dragged her into her bedroom by her hair. Defendant repeatedly punched Dailey's face, repeatedly stomped on Dailey's neck, twisted Dailey's neck with his hands, and then bound Dailey's hands with a scarf. Defendant showed Watson a knife before returning to Dailey's bedroom. Watson looked through Dailey's bedroom for jewelry. She observed Dailey lying by her closet and observed that she was not making any noise; Watson did not touch her. Watson left the house with Dailey's purse, containing an identification card and a wallet holding a Visa debit card and other credit or debit cards, while defendant left with jewelry and the cell phone and passport. A short time later, Watson observed that, in an area near the Seville Motel and a bus stop, defendant stomped into the ground in the Woodward Avenue median the knife he had used to cut and stab Dailey's throat.[3]

Watson testified that after 7:30 p.m. on November 20, 2011, she checked into the Seville Motel and that defendant discarded Dailey's cell phone on the motel roof and discarded other personal items from Dailey's purse elsewhere at the motel. Watson recalled that she found inside Dailey's purse a Visa debit card and what was ****13** apparently a personal identification number for it, that she asked defendant to try using the card, and that defendant left at about 7:45 p.m. and returned with $200 ***493** in cash that he had withdrawn using Dailey's card. Watson recounted that she then unsuccessfully tried withdrawing money at a bank near the hotel while wearing a bandana over her face and in defendant's company and that following a bus ride to Pontiac, defendant unsuccessfully tried using the card at a Mobil gas station. In Pontiac, defendant and Watson bought cocaine and heroin, and they then returned to the Seville Motel. Defendant walked past Dailey's house again that evening and noticed it "lit up like a Christmas tree," which prompted Watson and defendant's relocation to the De Lido Motel.

Watson testified that on November 21, 2011, defendant put Dailey's passport, debit card, and other cards in a bag and left them under some trees near the De Lido Motel, that she and defendant left the motel[4] and bought drugs in the Cass Corridor, and that Watson then checked them into a Westland lodging called the Paradise Hotel. Watson recalled that she and defendant walked toward a Meijer store in Canton, and along the way defendant discarded behind a Wal–Mart store a suitcase and a backpack that contained some of their clothing and a knife that defendant had stolen from the house where he had worked in September 2011.[5] Watson ***494** testified that she and defendant had intended to find another elderly woman to rob, but police officers arrested them at the store. According to Watson, when she and defendant were arrested, defendant had injuries on his hand that she first noticed after they left Dailey's house on November 20, 2011.[6] Watson testified that on November 23, 2011, she voluntarily provided lengthy statements to two detectives in which she revealed her and defendant's involvement in Dailey's death, the locations where "certain items could be located," including the knife defendant used and some of Dailey's belongings, and that she accompanied the police to assist them in finding several items.

B. DNA TESTING

Amy Altesleben, an expert in DNA analysis, testified at defendant's preliminary ****14** examination[7] that she received for analysis samples from a blue scarf, Dailey's nail clippings, a bloody washcloth found in Dailey's house, a sample of Dailey's blood, defendant's jeans and sweatshirt, and known samples from defendant and Watson. Altesleben determined that the blue scarf ***495** sample contained a DNA mixture from at least four contributors. She could not identify "a major donor in that sample" and could not exclude defendant as a contributor. In analyzing the nail clippings from Dailey's right hand, Altesleben explained that she found a mixture of DNA from more than two contributors, she could not identify major and minor donors, and she could not "make any conclusive determinations regarding [defendant's] DNA

as being a contributor to this profile." However, "a Y DNA type was detected on this sample which would indicate that at least one of the donors must be male." Altesleben forwarded these items to forensic scientist Heather Vitta for Y–STR DNA testing.

Vitta, an expert in DNA analysis including Y–STR DNA testing, testified about her performance of Y–STR DNA analyses on the samples from the blue scarf and Dailey's right-hand nail clippings, as well as a known sample from defendant. Vitta explained that Y–STR DNA testing focuses on areas of only the Y chromosome and has proved useful in isolating male donors to samples that also contain quantities of female DNA and that scientists referred to the Y chromosome profile produced in Y–STR DNA testing as a "haplotype." Regarding the blue scarf sample, Vitta testified that she identified the DNA of "up to three males" and that "a major male contributor to the scarf" existed. Regarding the sample from Dailey's right-hand nail clippings, she testified that she identified the DNA of two males and "a major male donor" also existed in this sample. According to Vitta, the major male haplotypes in the scarf and nail-clipping samples matched one another and the haplotype she identified from defendant's known sample; this match signified to Vitta that she could not exclude defendant as the contributor to the major male haplotypes on the scarf and nail-clipping ***496** samples.[8] Vitta entered into a database the major male haplotypes she identified in the scarf and nail-clipping samples, applied a 95% confidence limit, and yielded the following frequency results: (1) with respect to the major male haplotype in the scarf sample, the haplotype frequency was estimated as 1 in 1,923 in the Caucasian male population, 1 in 1,558 in the African–American male population, and 1 in 1,005 in the Hispanic male population and (2) with respect to the major male haplotype in the nail-clipping sample, the haplotype frequency was 1 in 2,342 in the Caucasian male population, 1 in 2,105 in the African–American male population, and 1 in 1,145 in the Hispanic male population.

C. OTHER–ACTS EVIDENCE

Before trial, the prosecution filed a motion to admit, under MRE 404(b)(1), evidence of several other acts, including (1) defendant's theft of a purse from his 77– ****15** year–old landlady, Joanne LaBarge, in October 2011, (2) defendant's multiple acts of theft between October 2010 and October 2011 from the shared Royal Oak home of two disabled women, Christina Duchamp and Nancy Foerster, who had hired defendant to work around their house, and (3) defendant's theft in September 2011 from a Berkley home where he was working for Joseph Paruch. Following a hearing held on June 13, 2012, the trial court entered an opinion and order, ***497** dated June 18, 2012, admitting the other-acts evidence. The trial court ruled, in relevant part:

> The Court finds the proffered evidence to be admissible under MRE 404(b). First, the Court finds the "other acts" evidence is being offered for proper purposes. Here, the evidence is for the purposes of proving (1) that Defendant intended to kill or cause great bodily harm[,] (2) that Defendant intended to commit the crime of Larceny, (3) that Defendant acted with premeditation and deliberation, (4) that Defendant had a motive to commit the crimes charged, (5) that Defendant acted pursuant to a common scheme, plan, or system, and (6) that co-Defendant Tonia Michele Watson is not fabricating the incident. All of these are proper purposes.

Concerning MRE 403, the court concluded that "the proffered similar acts are highly probative on the issue of whether Defendant committed the charged acts" and rejected the position that the risk of unfair prejudice "substantially outweigh[ed] its probative value."

At trial, Joseph Paruch testified that he and his wife and daughter lived in Berkley in September 2011. Paruch identified defendant as the man who had approached him at a Home Depot store in early September 2011 to inquire whether he "had any odd jobs for him to do." Later the same day, Paruch drove defendant to his house to show defendant a bathroom that he wanted remodeled, and defendant agreed to perform the work. Between September 13, 2011, and September 22, 2011, defendant worked for approximately three hours a day after Paruch or his wife arrived home and could supervise defendant, and Paruch paid defendant in cash. Paruch recalled that on September 22, 2011, defendant for the first time failed to appear for work. Paruch noticed that a portion of the bed in his bedroom was out of place; searching the room, he discovered that a .32 caliber handgun and a jar of medical marijuana were ***498** missing. Paruch reported the theft to the Berkley police. Later that day, defendant called

Paruch to tell him that he had not "come to work because he was making arrangements to get a ... new apartment." Defendant never returned to finish the job. A couple of weeks later, Paruch received a call from the Berkley police, which prompted him to undertake additional searching in his bedroom, and he noticed that a knife was missing from his bedroom nightstand. Paruch acknowledged that defendant had not been charged with a crime relating to the theft from his house.

Sara Paruch, Joseph Paruch's daughter, also identified defendant at trial as the man her parents had hired to work in their house. Sara testified that, on September 22, 2011, after a discussion with her father about some items missing from the house, she became suspicious about a knife missing from a desk in her bedroom. When a detective called her, she became certain that her knife had also been taken. She added that defendant once helped her perform a task in her bedroom, and she "notice[d] him looking around [her] bedroom" enough to make her suspicious and uncomfortable. Sara denied having filed a complaint relating to her missing knife.

****16** Watson testified that in September 2011, defendant told her about his Home Depot meeting with Joseph Paruch and his work on a bathroom at the Paruchs' house. Watson recounted that at some point around September 2011, she observed defendant in possession of "a black bag that had a gun in it," two knives, and "two bags of marijuana and quarters," none of which belonged to him. Watson recalled defendant having advised her that he had obtained the property from the Paruchs. According to Watson, defendant sold the handgun. Watson identified the knives at trial and testified that defendant usually carried one of the knives with ***499** him. The Paruchs also identified the knives as those that had been stolen from them.

Watson testified that in February 2011, she became acquainted with Royal Oak residents Christina Duchamp and Nancy Foerster through defendant. Watson and defendant both did work at the house where Duchamp and Foerster lived and received payment for their work. In Watson's estimation, Duchamp had a physical disability and Foerster had mental and physical disabilities. Watson recalled that in late June 2011, Duchamp informed defendant about money and other property missing from the house and "that they just didn't need ... his help anymore." Watson confirmed that defendant stole money, pain pills, and silver from the house. In October 2011, defendant told Watson that he went to Duchamp and Foerster's house, but Duchamp reiterated that they didn't want him to work for them anymore. Watson described how, later in October 2011, she and defendant took a bus to Duchamp and Foerster's house at 5:00 a.m. intending to steal from them. They knew that Duchamp and Foerster would be home. Defendant brought with him a baseball bat and went inside alone through a window. He then came outside with a red purse that contained a credit card in Duchamp's name, and around 9:00 a.m. on October 12, 2011, she and defendant bought groceries from a Meijer store. Watson paid for the groceries using Duchamp's credit card. When asked whether defendant had discussed his intentions while inside the house, Watson answered that defendant "had thought about tying them up and putting them in the basement and trying to get money from the pin numbers ... [of] their credit cards" and "[s]etting the house on fire."

Watson further testified that in October 2011, she and defendant lived together in a Pontiac rental home. ***500** Watson characterized their landlady, LaBarge, as "a nice lady" who "was ... very patient with [her and defendant] as far as getting the rent," letting them move in without a deposit, and coming "by to check on us." Once, when they visited LaBarge's house, Watson saw defendant take LaBarge's purse from a chair, and she and defendant " went out back and looked through the contents." Watson remembered that she and defendant had discussed "going into her home [to steal again], but [defendant] said that it would be noticeable because" LaBarge lived on a main street.

The jury convicted defendant. This appeal followed.

II. ADMISSION OF OTHER–ACTS EVIDENCE

[1] **[2]** Defendant argues that the trial court's admission of other-acts evidence violated MRE 404(b)(1), which prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing that the defendant's action was in conformity with his criminal character. See *People v. Sabin (After Remand)*, 463 Mich. 43, 56, 614 N.W.2d 888 (2000). We disagree. We review for an abuse of discretion a trial ****17** court's ruling on the admission of evidence; however, we review de novo preliminary legal issues regarding admissibility. *People v. Jambor (On Remand)*, 273 Mich.App. 477, 481, 729 N.W.2d 569 (2007).

MRE 404(b)(1) provides in relevant part:

> 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 ***501** crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[3] **[4]** Evidence of a defendant's other acts or crimes is admissible if (1) the prosecution offers the evidence for a proper purpose under MRE 404(b)(1); (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; on request, the trial court can read the jury a limiting instruction that describes the proper consideration of the other-acts evidence. *People v. Starr*, 457 Mich. 490, 496, 577 N.W.2d 673 (1998); *People v. Ackerman*, 257 Mich.App. 434, 439–440, 669 N.W.2d 818 (2003).

We conclude that the trial court acted within its discretion in admitting the other-acts evidence for several relevant purposes not related to character. The evidence of defendant's other thefts admitted at trial was relevant to proving several elements of the offenses with which defendant was charged. First, all three other acts of defendant's theft—from the Paruch house in September 2011, from the residence of Duchamp and Foerster in October 2011, and from LaBarge's house in October 2011—reasonably tended to make it more likely than not that he intended to commit larceny from Dailey's house in November 2011, an element of the present larceny-in-a-building charge against defendant. MRE 401; MCL 750.360; *People v. Sykes*, 229 Mich.App. 254, 278, 582 N.W.2d 197 (1998). Second, the evidence of defendant's theft from Duchamp and Foerster—and specifically his carrying of a baseball bat inside their house and his statements about tying them up, placing them in the basement, and setting their house ablaze—reasonably tended to make it more likely than not that defendant either intended to kill or inflict great bodily harm on ***502** Dailey in November 2011, an element of the first-degree-felony-murder charge, MRE 401; MCL 750.316(1)(b); *People v. Comella*, 296 Mich.App. 643, 651–652, 823 N.W.2d 138 (2012), or premeditated and deliberated the killing of Dailey in November 2011, an element of the first-degree-premeditated-murder charge, MCL 750.316(1)(a). Watson's testimony that defendant carried into Dailey's house a knife that he stole from the Paruch house also tended to prove the elements of premeditation and deliberation. *People v. Coy*, 243 Mich.App. 283, 315–316, 620 N.W.2d 888 (2000).

Additionally, a large portion of the other-acts evidence was admissible to show the existence of a common plan, scheme, or system. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, 463 Mich. at 63, 614 N.W.2d 888. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series ****18** of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Id.* at 65–66, 614 N.W.2d 888 (quotation marks and citation omitted). "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts." *Id.* at 66, 614 N.W.2d 888 (quotation marks and citation omitted).

The bulk of the other acts also shared several common features with the offenses in the instant case. The evidence regarding Duchamp and Foerster demonstrated that defendant targeted vulnerable women, ***503** specifically that he became acquainted with Duchamp and Foerster, two disabled women, by offering to work around their home. Similarly in this case, he became acquainted with Dailey, an 80–year–old woman who lived alone, by offering to work around her house. In each situation, he returned to the homes of the vulnerable women intending to steal from them and armed himself with a weapon, a baseball bat in October 2011 and a knife in this case. On each occasion, defendant stole purses and bank cards from the vulnerable women. A jury could reasonably infer that defendant employed a common plan, scheme, or system to achieve his acts of targeting and stealing from Dailey, Duchamp, and Foerster, notwithstanding that defendant did not physically harm Duchamp or Foerster.

Sabin, 463 Mich. at 63–66, 614 N.W.2d 888. Regarding defendant's thefts from LaBarge, defendant again targeted a vulnerable and elderly woman for theft, entered her home, and stole purses or wallets. A jury could reasonably infer that defendant employed a common plan, scheme, or system to achieve his acts of targeting and stealing from Dailey and his landlady. *Id.* We find no abuse of discretion in the trial court's admission of this evidence.

[5] Further, some of the other-acts evidence would have been admissible even without resort to MRE 404(b). Without analyzing admissibility under MRE 404(b), a court may admit "[e]vidence of other criminal acts ... when it explains the circumstances of the crime." *People v. Malone*, 287 Mich.App. 648, 662, 792 N.W.2d 7 (2010). The evidence of defendant's prior theft from the Paruch home helped explain where he acquired the knife he used in assaulting Dailey. Further, Watson's testimony about defendant's possession of a knife he stole from the Paruch house and his use of the knife in killing Dailey constituted direct, relevant evidence supporting ***504** the murder charges. *People v. Hall*, 433 Mich. 573, 580–581, 447 N.W.2d 580 (1989).

[6] Regarding unfair prejudice, defendant fails to offer any specific example of unfair prejudice or other basis for exclusion under MRE 403. In light of the probative value inherent in the other-acts evidence toward proving multiple relevant matters and the limiting instruction that the court read to the jury concerning its proper consideration of the other-acts evidence, we do not find that the danger of "unfair prejudice, confusion of the issues, or misleading the jury" substantially outweighed the probative value of the evidence, MRE 403. See *Starr*, 457 Mich. at 503, 577 N.W.2d 673; see also *People v. Magyar*, 250 Mich.App. 408, 416, 648 N.W.2d 215 (2002) (observing that "a limiting instruction such as this one that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant's right to a fair trial").

We find no error in the trial court's admission of other-acts evidence.

****19** III. PROSECUTORIAL MISCONDUCT

[7] **[8]** **[9]** Defendant next argues that the prosecutor engaged in misconduct in her opening statement by vouching for the credibility of Watson and that the trial court erred by not granting his motion for a mistrial. We disagree. This Court "review[s] claims of prosecutorial misconduct case by case ... to determine whether the defendant received a fair and impartial trial." *People v. Watson*, 245 Mich.App. 572, 586, 629 N.W.2d 411 (2001). We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial. *People v. Schaw*, 288 Mich.App. 231, 236, 791 N.W.2d 743 (2010).

[10] ***505** A prosecutor may not vouch for the credibility of his or her witnesses "to the effect that [the prosecutor] has some special knowledge concerning a witness'[s] truthfulness." *People v. Bahoda*, 448 Mich. 261, 276, 531 N.W.2d 659 (1995). However, merely " '[b]y calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness'[s] veracity.' " *Id.* (citation omitted) (first alteration in original).

During opening statements, the prosecutor addressed Watson's testimony as follows:

> You are also going to hear from Tonia Watson in this case. And I'm sure that the defendant is going to do everything he can to make her look like a liar. So be prepared for that.
>
> She's going to testify as a witness for the prosecution because aside from Nancy Dailey and the defendant she's the only one that knows what happened in that house that night.
>
> Now you are going to hear about her role that she played in the crimes that were committed because like I said she was not completely innocent.
>
> You're going to hear that she's a thief. You're going to hear that her fingerprint was found on a jewelry case, on a jewelry box that was found in Nancy Dailey's bedroom on a dresser.
>
> You're also going to hear that she was originally charged not with first degree premeditated murder, but she was charged with felony murder for the role that she played in assisting and committing the larceny that was the underlying offense for the felony murder.
>
> She was also charged with larceny in a building and she was also charged with the financial transaction device for the one that she attempted to use that card that we know of.

> ***506** You're going to hear that as a result of her coming in this court testifying before you and it's conditioned upon the prosecutor believing that she's testifying truthfully she will get a reduced charge. She will be pleading to second degree murder, larceny in a building and financial transaction device. She will serve a minimum—

Defense counsel objected at that point on the ground that the prosecutor's comments constituted improper vouching for the witness. The trial court reinstructed the jury that the opening statements of attorneys were not evidence and that the trial court would provide the jury with the applicable law. Defendant moved for a mistrial on the basis of the prosecutor's comments; the trial court denied the motion.

Our review of the trial court record convinces us that the prosecutor's reference to Watson's plea agreement did not embody an inappropriate " 'suggest [ion] that the government had some special knowledge, not known to the jury, that the witness ****20** was testifying truthfully.' " *Bahoda*, 448 Mich. at 276, 531 N.W.2d 659 (citation omitted). Further, even if the prosecutor's statements were improper, the trial court's instructions, which emphasized that the prosecutor's opening statement was not evidence and that the jury alone had the responsibility to determine witness credibility, cured any potential prejudice. *People v. Unger*, 278 Mich.App. 210, 235, 749 N.W.2d 272 (2008) (observing that "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions") (citations omitted). Therefore, the trial court acted within its discretion by denying defendant's motion for a mistrial. *Schaw*, 288 Mich.App. at 236, 791 N.W.2d 743.

IV. ADMISSION OF Y–STR DNA TESTING EVIDENCE

[11] **[12]** Defendant next argues that the trial court erred by admitting the testimony of the prosecution's experts ***507** concerning Y–STR DNA testing,[9] either because it should not have been admitted pursuant to MRE 702 or because it should have been excluded under MRE 403. We disagree. This Court reviews for an abuse of discretion a trial court's qualification of an expert witness and its ultimate ruling regarding whether to admit expert testimony. *Unger*, 278 Mich.App. at 216, 749 N.W.2d 272.

MRE 702, which governs the admissibility of expert testimony, provides:

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

[13] **[14]** **[15]** **[16]** **[17]** A trial court "may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 782, 685 N.W.2d 391 (2004). "When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its error rate if known," *People v. Kowalski*, 492 Mich. 106, 131, 821 N.W.2d 14 (2012) (opinion by MARY BETH KELLY, J.), and "the existence and maintenance of standards controlling the technique's operation," ***508** *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions ****21** reached through reliable principles and

> methodology. [*Gilbert*, 470 Mich. at 782, 685 N.W.2d 391.]

The trial court need not "admit only evidence that is unassailable" or investigate "whether an expert's opinion is necessarily correct or universally accepted." *Unger*, 278 Mich.App. at 218, 749 N.W.2d 272 (quotation marks and citation omitted).

The trial court held a *Daubert* hearing in this case, at which Julie Marie Ferragut testified that she had worked since January 2003 as "a senior DNA analyst" at Bode Technology, "a private forensic DNA laboratory." Ferragut further testified about her academic and scientific credentials and explained that her job involved performing "DNA testing on forensic evidence samples," including DNA testing (1) in backlogged cases of law enforcement agencies, (2) for defense attorneys and the Innocence Project, (3) to identify victims of mass disasters, and (4) to add convicted-offender profiles to a database. Ferragut estimated that Bode Technology had processed 1.4 million DNA profiles for the convicted-offender database. Ferragut testified that she completed twice-yearly proficiency testing for both autosomal STR DNA testing and Y–STR testing. [10] Ferragut further testified that Bode Technology ***509** had received accreditations from "the American Society of Crime Lab Directors, the Lab Accreditation Forum, ... Forensic Quality Services, and ... the New York State Department of Health."

Ferragut testified that for approximately 10 years she had undertaken autosomal STR DNA testing, and for seven years had performed Y–STR DNA testing in approximately one or two percent of her caseload. Ferragut completed training programs on both forms of DNA testing. She also confirmed that she had testified as an expert in 32 jurisdictions, including Michigan; that on each occasion courts admitted her testing results; that she had testified at least eight times about Y–STR DNA testing, including in Michigan in 2007; and that her testimony about Y–STR DNA testing had occurred on behalf of both the prosecution and the defense. The trial court qualified Ferragut as "an expert in DNA analysis, including Y–STR." According to Ferragut, approximately 2,000 peer reviews of Y–STR DNA testing had documented its general acceptance as reliable within the scientific community, and her own experience with Y–STR DNA testing established that it "produce[d] accurate and reliable results."

Ferragut explained that the Y–STR DNA analysis involves testing DNA only on the Y-chromosome and that Y–STR DNA testing could not uniquely identify an individual because "a given male is going to have the ***510** same Y–STR profile as his father, and his grandfather...." As one situation in which Y–STR DNA testing might prove useful, Ferragut noted "that with mixtures of male and female DNA, a lot of times the female DNA can overwhelm the male DNA or ... mask the male DNA altogether, so with using Y–STR's, we're able to target the male DNA ****22** without any kind of interference from the female DNA."

Ferragut further testified that the analysis of both autosomal DNA and Y chromosomal DNA involved the same series of steps and control measures. Ferragut explained that the only difference between the amplification step [11] in autosomal STR DNA and Y–STR DNA analyses involved the targeting of different areas of DNA through commercially produced kits. Ferragut added that, if a match exists between the DNA profile obtained from an evidence sample and that from a known sample (one obtained from an identified individual), the analyst generates a statistical calculation by entering the DNA profile information into a computer program "to see how common that profile is in the general population." Ferragut explained that in the event of a Y–STR DNA match, "it can be searched in a data base, and depending on the number of matches that were obtained in the data base, you can then use a statistical calculation to determine how common it is or you would expect it to be in the population of unrelated males." Ferragut further explained that if an analyst identified a Y–STR DNA match in "all the [Y chromosome] locations on the evidence" with "all the locations identified in a known suspect's sample," the DNA could have come from the suspect or someone else in his ***511** paternal line; additionally there was "a possibility that it could randomly match in the population." Finally, Ferragut stated that, after DNA testing occurs, "a technical review is performed on the case to make sure that it is scientifically accurate."

Vitta testified at the *Daubert* hearing that in 1997 she began working at the Michigan State Police "Northville Biology and DNA unit" identifying bodily fluids and performing autosomal STR DNA and Y–STR DNA analyses. In 2005, she had become the supervisor of the Northville laboratory, and in that position she "supervise[d] the other ... forensic scientists ... conducting case work analysis on forensic evidence samples as well as reference samples" and did her own testing of autosomal DNA and Y chromosomal DNA. Vitta also recounted her extensive academic and professional credentials.

Vitta testified that the Northville laboratory currently had multiple national and international accreditations, for which independent auditors frequently examined "every aspect of the laboratory," including "cases and reports ... and the data that was generated for those cases." The Northville laboratory also used controls at each step of its DNA testing process. Vitta estimated that she had performed thousands of DNA tests and testified as an expert on the subject many times, but this was her first case testifying as an expert in Y–STR DNA testing. The trial court certified Vitta as an expert in DNA analysis, including Y–STR DNA analysis.

Vitta testified that autosomal STR DNA testing involved chromosomes other than the sex chromosomes, while Y–STR DNA testing involved analyzing areas present only on one of the sex chromosomes, the Y chromosome. Vitta verified that the Northville laboratory ***512** adhered to national guidelines in performing DNA analyses. She summarized the very similar steps involved in both autosomal STR DNA and Y–STR DNA testing. Vitta acknowledged that an autosomal STR DNA match could specifically identify one person, but a Y–STR DNA match did not allow for the exclusion of a random match. Vitta offered an example of when Y–STR DNA ****23** testing could prove beneficial, stating, "[I]f you have a sample that ... has a lot of female DNA in it, and only a tiny amount of male DNA, ... it ignores completely that non-male DNA portion of that sample, and can pinpoint ... just the male contribution to that sample."

Vitta testified that the statistical calculation regarding a Y–STR DNA match (haplotype) differed from the calculation performed on an autosomal STR DNA match. The Michigan State Police used a database called "the USYSTR data base," which at the time of Vitta's testimony in September 2012 consisted of "approximately 23,000 male samples" contributed by academic institutions, law enforcement, and other groups across the United States.[12] When Vitta performed the Y–STR DNA analyses in this case, the USYSTR database contained more than 18,000 sample haplotypes. Concerning haplotypes from Midwest males, Vitta recounted that organizations in Illinois, Minnesota, and Wisconsin had submitted samples, and because Michigan submitted samples to the FBI, which contributed samples to the USYSTR database, the database might contain some Michigan samples. When making calculations of haplotype frequency, Vitta testified that a ***513** "scientific working group on DNA [analysis] methods" recommended that scientists employ a particular calculation when using the USYSTR database and apply "a 95 percent confidence limit ... to any calculation ... conducted using the USYSTR" database.[13]

In this case, Vitta conducted Y–STR DNA testing on "a reference sample from [defendant]," on DNA extracts from a blue scarf "that the victim ... was bound with when she was found on November 20, 2012," and on DNA extracts from fingernail clippings off the victim's right hand. Vitta testified that she identified DNA haplotypes at multiple locations for the blue scarf sample, the right-hand nail clippings, and defendant's known sample. She noticed the same "major male [haplotype] ... developed from both" the blue scarf and nail clipping samples. With respect to the blue scarf, Vitta undertook "a side-by-side comparison [of] the same areas of the ... Y chromosome that were amplified" in the known sample from defendant, compared "the [haplotypes] ... obtained at each one of those locations," noticed in the blue scarf sample "results that were consistent with three or more male donors," and opined that the major male donor haplotype in the blue scarf "matched the reference sample haplotype from [defendant]." Vitta also discovered that the major male donor of the DNA under the victim's fingernails matched "the major male Y–STR haplotype" from defendant's known sample.

Vitta testified that because the areas of the Y chromosome examined in Y–STR DNA testing "are inherited in ... a package ... from generation to generation down the male line," the significance of a Y haplotype match is that an individual is not excluded as a source ***514** of the DNA, although anyone " in that same paternal lineage," or, less likely, an unrelated male, could also share the same haplotype. When Vitta entered into the USYSTR database the major male haplotype she identified on the ****24** scarf that bound the victim, she received the following information: applying "a 95 percent confidence interval, the major Y–STR haplotype ... detected from the blue scarf would be expected to be observed in [1 in] 1,923 Caucasian males, [1 in] 1,558 African–American males, and [1 in] 1,005 Hispanic males." When Vitta entered into the USYSTR database the major male haplotype she identified under the victim's fingernails, it apprised her that taking into account the 95 percent confidence interval, the likelihood of observing the haplotype in the population of "Caucasian males was one in 2,342; African–American males one in 2,105; and Hispanic males one in 1,145."

The trial court ruled that the offered Y–STR DNA evidence was admissible, specifically holding that the prosecution had met the burden of showing that Ferragut's and Vitta's

testimony was rooted in "recognized scientific, technical, or other specialized knowledge" that would assist the trier of fact. *Gilbert,* 470 Mich. at 789, 685 N.W.2d 391 (quotation marks omitted). The trial court also concluded that defendant's issue with regard to the statistical analysis procedures and the database used in Y–STR DNA analysis would go to the weight of the evidence, not its admissibility. See *People v. Holtzer,* 255 Mich.App. 478, 491, 660 N.W.2d 405 (2003). Finally, the trial court ruled that the evidence's probative value was not outweighed by the danger of unfair prejudice. MRE 403.

We conclude that the prosecution carried its burden of demonstrating admissibility under MRE 702. Abundant evidence illustrated that the Y–STR DNA analysis ***515** technique "has been or can be tested," *Kowalski,* 492 Mich. at 131, 821 N.W.2d 14, and that standards exist to govern the performance of the technique, *Daubert,* 509 U.S. at 594, 113 S.Ct. 2786. The testimony of Ferragut and Vitta revealed that autosomal STR DNA analysis, the more common and well-established technique, and Y–STR DNA analysis, which came into being more recently, share a nearly identical series of requisite steps in the laboratory. Ferragut and Vitta testified that national guidelines delineate laboratory procedures for properly analyzing Y chromosomal DNA, multiple controls exist at each step of the Y–STR DNA analysis, the laboratories at which they worked subject the Y–STR DNA analysis to review, and accreditation organizations mandate routine proficiency testing of analysts who performed the Y–STR DNA analysis. Guidelines also exist for the commercial kits that test DNA on the Y chromosome in Y–STR DNA analysis. Further, both Ferragut and Vitta testified that many publications and peer reviews have scrutinized the soundness of the Y–STR DNA testing technique, as well as the statistical analysis methods and the database used by analysts. We conclude that the evidence was properly admitted under MRE 702. [14]

Further, Ferragut and Vitta repeatedly and plainly explained at the *Daubert* hearing the limited significance of a Y–STR DNA match, specifically that a match could not uniquely identify a male DNA donor and could only include a male as a potential DNA donor. At trial, Altesleben, Vitta, and a defense expert ***516** presented these limitations to the jury. We detect no danger of confusion or other unfair ****25** prejudice that would substantially outweigh the probative value inherent in the Y–STR DNA testing evidence. MRE 403.

V. RIGHT OF CONFRONTATION

[18] Defendant next argues that the trial court violated his right to confront witnesses against him, as well as MRE 804(b)(1), by allowing the admission of Altesleben's preliminary examination testimony. Defendant did not object to the admission of this evidence; this issue is therefore unpreserved and reviewed for plain error affecting substantial rights. *People v. Carines,* 460 Mich. 750, 763, 774, 597 N.W.2d 130 (1999).

We conclude that the trial court did not err by deeming Altesleben unavailable to testify at trial. Further, defendant enjoyed a prior, similar opportunity to cross-examine Altesleben, and thus the trial court violated neither the Confrontation Clauses, U.S. Const., Am. VI and Const. 1963, art. 1, § 20, nor MRE 804(b)(1) by allowing the reading of Altesleben's preliminary examination testimony at trial. Defendant also has not established that trial counsel was ineffective for failing to object to the reading of Altesleben's prior testimony.

A trial court may admit "[f]ormer testimony ... under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v. Garland,* 286 Mich.App. 1, 7, 777 N.W.2d 732 (2009). MRE 804, which describes hearsay exceptions for various prior statements of unavailable witnesses, provides, in relevant part:

> ***517** (a) *Definition of Unavailabilty.* "Unavailability as a witness" includes situations in which the declarant—
>
> * * *
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity....
>
> * * *
>
> (b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered ... had an

opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The prosecutor moved to admit at trial Altesleben's preliminary examination testimony on the basis of a doctor's order confining her to "bed rest as a result of complications associated with her pregnancy...." The court found that Altesleben was unavailable and admitted her preliminary examination testimony. We conclude that the trial court did not err by determining that Altesleben was unavailable because of a "then existing physical ... illness or infirmity." MRE 804(a)(4). See *Garland*, 286 Mich.App. at 7, 777 N.W.2d 732 (holding that "[b]ased on the evidence on the record showing that the victim was experiencing a high-risk pregnancy, that she lived in Virginia, and that she was unable to fly or travel to Michigan to testify, the trial court did not clearly err by determining that the victim was unavailable").

Further, "MRE 804(b)(1) by its language permits testimony from 'the same or a different [prior] proceeding' if the party against whom the testimony is ***518** offered had the opportunity and motive in the prior proceeding 'to develop the testimony by direct, cross, or redirect examination'." ****26** *People v. Morris*, 139 Mich.App. 550, 555, 362 N.W.2d 830 (1984) (alteration in original). In this case, defendant had ample opportunity to cross-examine Altesleben during his and Watson's joint preliminary examination. Altesleben testified at the preliminary examination on the very charges for which defendant stood trial. Defense counsel for both defendant and Watson cross-examined Altesleben during the preliminary examination; no indication exists that the district court limited their opportunities to cross-examine Altesleben, and the trial court admitted both cross-examinations at defendant's jury trial. Consequently, the trial court did not err by admitting the preliminary examination testimony pursuant to MRE 804(b)(1). See *People v. Meredith*, 459 Mich. 62, 66–67, 586 N.W.2d 538 (1998); *Morris*, 139 Mich.App. at 555, 362 N.W.2d 830. For the same reasons, defendant was not denied his right to confront witnesses against him. See *California v. Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Because we find no error in the trial court's admission of this evidence, we also find no merit to defendant's alternative argument that his trial counsel was ineffective for failing to raise a groundless objection to the reading of Altesleben's preliminary examination testimony. *People v. Thomas*, 260 Mich.App. 450, 457, 678 N.W.2d 631 (2004).

VI. ACCOMPLICE JURY INSTRUCTION

[19] **[20]** Next, defendant argues that the trial court improperly bolstered Watson's credibility with an improper jury instruction. We disagree. In the first instance, ***519** defendant waived any claim of error regarding the jury instructions when his counsel affirmatively approved the instructions. *People v. Carter*, 462 Mich. 206, 208–209, 215, 612 N.W.2d 144 (2000). Further, the jury instructions were not improper.

[21] **[22]** **[23]** **[24]** "A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v. Rodriguez*, 463 Mich. 466, 472, 620 N.W.2d 13 (2000) (quotation marks and citation omitted). This Court reviews jury instructions as a whole to determine whether error requiring reversal occurred. *People v. Bartlett*, 231 Mich.App. 139, 143, 585 N.W.2d 341 (1998). The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses, or theories that the evidence supports. *Id.* Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v. Knapp*, 244 Mich.App. 361, 376, 624 N.W.2d 227 (2001); *Bartlett*, 231 Mich.App. at 143–144, 585 N.W.2d 341.

Watson testified that on November 20, 2011, she and defendant returned to Dailey's house after defendant had proposed robbing Dailey; she and defendant entered Dailey's house; they both participated in taking Dailey's personal property from different areas of the house; and in Watson's presence, defendant repeatedly punched Dailey's face and stomped on her neck, twisted Dailey's neck with his hands, bound her hands with a scarf, and exhibited to Watson a knife before returning to Dailey's bedroom. Watson also testified that in December 2012, the prosecution agreed to dismiss a felony-murder charge against her if she pleaded guilty of second-degree murder, larceny in a building, and unlawful possession of a financial transaction device. ***520** Watson affirmed that if she "fulfill[ed] certain conditions ... [she ****27** would] serve a minimum of twenty-three years[.]"

The trial court gave instructions that closely mirrored standard accomplice instructions CJI2d 5.4[15] and CJI2d 5.6.[16] Defendant nonetheless complains that the ***521** instructions as given contained language regarding Watson's plea agreement premised on her truthful testimony (which

language also appears in CJI2d 5.4), improperly bolstering Watson's credibility.

However, the instructions did not state or suggest that Watson had offered truthful testimony, but only that the prosecution had agreed to pursue a lesser charge against Watson if she offered truthful testimony and that the prosecution remained free to alter the plea agreement if it obtained additional evidence against Watson. Furthermore, the entirety of the instructions mirroring CJI2d 5.4 and CJI2d 5.6 plainly cautioned the jury about accepting Watson's testimony for multiple reasons. Moreover, the trial court informed the jury on three occasions that it had the sole responsibility to assess credibility. In light of Watson's testimony establishing her longtime use of cocaine and heroin and her offering of a statement to the ***522** police, the trial court additionally gave an addict-informer instruction, CJI2d 5.7,[17] which ****28** provided additional cautions to the jury regarding judging Watson's credibility.[18] Finally, the trial court instructed the jury that it should consider her agreement to testify in exchange for the prosecution's dismissal of a charge involving "a possible penalty of life without parole" "as it relates to [her] credibility and as it may tend to show [her] bias or self-interest."

We find no error in the trial court's use of an instruction modeled on CJI2d 5.4. *People v. Jensen*, 162 Mich.App. 171, 187–188, 412 N.W.2d 681 (1987) (explaining that in light of a witness's "admissions and his guilty plea to a reduced charge arising from the incident, his status as an accomplice was beyond dispute" and that the court should have instructed the jury pursuant to CJI2d 5.4). And because the trial court correctly and accurately conveyed to the jury the contents of CJI2d 5.4 and CJI2d 5.6, defense counsel need not have objected to the proper jury instructions. *Thomas*, 260 Mich.App. at 457, 678 N.W.2d 631.

VII. LAY–OPINION TESTIMONY

[25] In his Standard 4 brief,[19] defendant argues that Detective Perry Edgell of the Royal Oak Police Department improperly opined at trial that a knife in evidence constituted the same one that defendant had used to kill Dailey and discarded onto the Woodward Avenue median. We disagree. Defendant objected to the foundation for Edgell's description of the knife, but did not object to Edgell's description as improper lay-opinion testimony; this issue is therefore unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich. at 763, 774, 597 N.W.2d 130.

Edgell testified that he participated in the investigation of Dailey's death and was familiar with the location where the police recovered a knife "in the median of Woodward [Avenue]." After the prosecutor asked Edgell to point on a map to the precise location where the police discovered the knife, the following colloquy occurred:

> ****29** ***523** [*Edgell*]: Yes. The knife that was used to kill Nancy Dailey was found—
>
> [*Defense counsel*]: Objection, your Honor to the statement that the knife that was used to kill Nancy Dailey. I move to strike. There's absolutely no evidence—
>
> *The Court:* I'll strike it.
>
> [*Prosecutor*]: That's fine.
>
> ***524** [*Defense counsel*]: Thank you.

At the conclusion of Edgell's testimony, defense counsel requested a mistrial, arguing that Edgell's reference to the knife as the murder weapon prejudiced defendant's right to a fair trial because "[t]hat determination ... is purely within the providence [sic] of the jury" and "there was no reason for him ... to volunteer that type of information before this jury." The trial court denied the mistrial motion, reasoning that it had "struck the statement from the record and if the defense wants a special instruction now or later on you can have one." The record does not indicate that defense counsel ultimately requested a special jury instruction.

After Edgell's stricken testimony, several officers, Watson, and Paruch all testified to the effect that the knife recovered from the median was the same knife that had been (1) stolen from the Paruch household, (2) shown to Watson by defendant before he returned to Dailey's bedroom, (3) indicated by defendant to Watson as the knife that he used to cut and stab Dailey's throat and thereafter "stomped ... in[to] the median over there by Woodward" by the Seville Motel, and (4) recovered partially stuck in the ground at that location. Thus, even assuming that Edgell's statement was erroneous, defendant cannot demonstrate, in light of other properly admitted evidence, that his substantial rights were affected by this isolated (and stricken) statement. ***525** We find no plain error requiring reversal in the trial court's refusal to grant a mistrial based on Edgell's stricken statement. *Carines*, 460 Mich. at 763, 774, 597 N.W.2d 130.

VIII. EXCULPATORY EVIDENCE

[26] Next, defendant argues in his Standard 4 brief that the prosecution suppressed exculpatory evidence in the form of DNA tests, conducted seven months after the offense was committed, on Jonathan Baker and DeJuan Crawford. We disagree. This issue was not raised at trial and is therefore unpreserved and must be reviewed for plain error affecting substantial rights. *Carines*, 460 Mich. at 763–764, 774, 597 N.W.2d 130.

[27] **[28]** "Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v. Schumacher*, 276 Mich.App. 165, 176, 740 N.W.2d 534 (2007), citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To establish a *Brady* violation, a defendant must prove

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Schumacher*, 276 Mich.App. at 177, 740 N.W.2d 534 (quotation marks and citation omitted).]

Defendant attaches as Exhibit 1 to his Standard 4 brief a June 2012 "DNA Extraction Worksheet," which lists many items that Altesleben extracted DNA from in this case, including a "[k]nown buccal [swab] from DeJuan Crawford" and ****30** "[k]nown blood from Jonathan Baker." But defendant identifies nothing tending to ***526** establish that this evidence was favorable to him, that he could not have possessed it with reasonable diligence, that the prosecution suppressed it, or that a reasonable probability existed that the disclosure of the evidence might have altered the outcome of his trial. *Id.* In short, defendant has utterly failed to support his claim that the prosecution suppressed exculpatory evidence.

IX. CHAIN OF CUSTODY/EVIDENCE CONTAMINATION/MISHANDLING OF EVIDENCE

[29] Next, defendant argues in his Standard 4 brief that key DNA evidence was mishandled. Defendant did not object at trial to the admissibility of the evidence delivered to the police forensic laboratory for testing on the basis that the police failed to maintain the chain of custody or otherwise exposed the evidence to degradation or tampering, or on the basis that Altesleben improperly processed or tested evidence. Consequently, this issue is unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich. at 763, 774, 597 N.W.2d 130. We disagree that error requiring reversal occurred.

First, defendant argues that the record reflects that Detective Carl Barretto removed these items from police storage around noon on November 25, 2011, but that the forensic laboratory inexplicably did not receive the items until late on November 28, 2011. In the intervening time, the evidence was locked in Barretto's office, which defendant argues allowed for potential contamination or tampering with evidence.

At trial, defense counsel questioned Barretto regarding his handling of evidence. Barretto confirmed that on Friday, November 25, 2011, the day after Thanksgiving, he had processed all the evidence tested by the Sterling Heights state police forensic laboratory, including the ***527** clippings from Dailey's fingernails, the hair removed from Dailey's head, the hairs found on Dailey's body, Dailey's clothes, and the blue scarf used to bind Dailey's arms. Barretto insisted that he had complied with departmental policies by advising the property officer on November 25, 2011, "which pieces of evidence [he] needed to take to the lab." Barretto acknowledged that he delivered the evidence to the laboratory at 10:40 a.m. on November 28, 2011. However, Barretto repeatedly testified that he had secured the evidence in his office, and further explained as follows about the reason for the delayed delivery:

> As I previously stated, sir, it was locked and secured in my office. The lab was closed on that day being a holiday week and weekend. The lab was closed that Friday afternoon, actually the entire Friday. I wanted to take it basically as quick [as] I can Monday morning to the lab. That's why I already had the property signed out and ready to go, as I stated secured in my office.

* * *

> It remained in that same condition in my office ... when I took it to the lab on Monday morning.

Barretto in later testimony reiterated that the evidence he delivered to the laboratory was in the same condition as when it was recovered from Dr. Bernardino Pacris, the forensic pathologist who performed Dailey's autopsy.

In summary, the record belies defendant's suggestion that Barretto subjected the evidence to contamination or tampering. Defendant has failed to offer on appeal anything beyond mere speculation ****31** that tagged, logged in, and secured evidence locked in a police detective's office was vulnerable to tampering or contamination, and therefore has failed to substantiate any error, plain ***528** or otherwise, concerning Barretto's transfer of evidence to the police forensic laboratory.

Defendant attached as Exhibits 8 through 18 to his Standard 4 brief printouts of log entries that the Michigan State Police crime laboratories maintained concerning the forensic testing of evidence in this case. According to defendant, the log entries "show that Ms. Altesleben continuously failed to log evidence out properly, anywhere from 6 hours to 6 days, therefore making this documentary evidence invalid." We disagree. Contrary to defendant's contention, the exhibits contain Altesleben's log entries concerning the items she examined. And defendant presents no factual basis suggesting that Altesleben improperly processed or stored the evidence or that her manner of processing the evidence might have contaminated it. Defendant accordingly has failed to substantiate any error, plain or otherwise, concerning Altesleben's evidence processing.

Because defendant has not established any factual support for his arguments concerning the mishandling of evidence, he has not established a factual predicate for his alternative claim that his counsel was ineffective for failing to object to its admission on this ground. *People v. Hoag*, 460 Mich. 1, 6, 594 N.W.2d 57 (1999).

X. ADMISSION OF WATSON'S STATEMENT TO THE ROYAL OAK POLICE

[30] Finally, defendant argues in his Standard 4 brief that the admission of Watson's statement to the Royal Oak police violated his constitutional rights, or alternatively that his counsel was ineffective for failing to object to its admission. We disagree. Defendant's argument is partially premised on his claim that the police violated Watson's right to protection from unreasonable searches and seizures in obtaining her statement; however, ***529** defendant has no standing to challenge a violation of Watson's Fourth Amendment rights. *People v. Gadomski*, 274 Mich.App. 174, 178, 731 N.W.2d 466 (2007). Similarly, his trial counsel was not required to lodge a meritless objection on this ground. *Thomas*, 260 Mich.App. at 457, 678 N.W.2d 631.

Defendant also argues that his trial counsel should have obtained "medical records from the Royal Oak police department for the treatment of Ms. Watson's withdraws [sic]."[20] However, any such records would only be relevant with respect to the voluntariness of Watson's statements to the police, which defendant lacks the standing to challenge. *In re Investigative Subpoena re Homicide of Morton*, 258 Mich.App. 507, 509, 671 N.W.2d 570 (2003). Further, defense counsel questioned Watson at length about her use of illegal and prescription drugs, including around the time of her statements; we thus find no error requiring reversal in counsel's failure to obtain these records. *People v. Marshall*, 298 Mich.App. 607, 612, 830 N.W.2d 414 (2012), vacated in part on other grounds 493 Mich. 1020, 829 N.W.2d 876 (2013).

Because we conclude that defendant has not demonstrated actual errors resulting in unfair prejudice, defendant's claim that the cumulative effect of several errors warrants reversal must also fail. See *People* ****32** *v. LeBlanc*, 465 Mich. 575, 591 & n. 12, 640 N.W.2d 246 (2002); *Carines*, 460 Mich. at 763, 774, 597 N.W.2d 130.

Affirmed.

MARKEY and KIRSTEN FRANK KELLY, JJ., concurred with BOONSTRA, P.J.

All Citations

307 Mich.App. 485, 862 N.W.2d 7

Footnotes

1 The trial court ordered that defendant serve the sentences consecutively to the remainder of a sentence for which he had received parole from prison.

2 The prosecutor introduced still photos and surveillance video depicting the Royal Oak McDonald's as of approximately 1:30 p.m. on November 20, 2011, and two police officers testified that defendant appeared in the images wearing clothing similar to the clothes he was wearing at the time of his arrest.

3 Multiple officers testified that they recovered a knife from the Woodward Avenue median near a bus stop across from the Seville Motel.

4 Royal Oak Police Lieutenant Mike Frazier testified that with Watson's assistance, he found a red rag and a clear plastic bag between some trees and under some leaves near the De Lido Motel. The bag contained a wallet with Dailey's Visa debit card, Dailey's state identification card and passport, and other cards. Frazier testified that he also recovered paperwork bearing the name Christina Duchamp, one of defendant's prior theft victims, in the same location.

5 Canton Township Officer James Marinelli testified that, at the request of the Royal Oak Police Department on December 1, 2011, he assisted in searching for a suitcase in "a **wooded** area behind" a Wal–Mart store on Ford Road. Marinelli observed 25 feet into the **woods** "a black suitcase leaned up against a tree with sticks and some large pieces of bark laying on top of it." Canton Police also located "a gray and black shoulder bag ... lying underneath the black suitcase." Marinelli testified that the suitcase contained female clothing and hygiene products, prescriptions bearing the name Tonia Sledewski–Watson, and "paperwork ... with the name Tonia Michelle Sledewski...." The suitcase also contained a red bag holding "papers with the name Alan **Wood** on them" and "a picture I.D. card with the name Alan **Wood** on it." Marinelli recalled that the shoulder bag contained "envelopes of ... miscellaneous papers" and the knife that another witness, Sara Paruch, testified had gone missing when defendant worked in her house.

6 The Royal Oak police sergeant who booked defendant on November 22, 2011, testified that defendant's left hand had "scabbing in the area of the knuckles."

7 This testimony was introduced at trial; see Part V of this opinion for our discussion of defendant's challenge to the admission of this testimony.

8 Vitta cautioned that "with Y–STR analysis because we're not looking at all of the chromosome DNA it is more limited in its ability to tell the difference between one male and another male and it's not considered a unique identification." Vitta added that because men inherited their "male Y chromosome haplotype ... all the way down the line," a man "could have [male] cousins that would have the same haplotype as you," and it was possible "to have a completely unrelated male share the haplotype...."

9 "STR" stands for "short tandem repeats," which are short DNA sequences that are repeated numerous times in a particular area of a chromosome. Federal Judicial Center & National Research Council, Reference Manual on Scientific Evidence (3d ed.), pp. 140–142.

10 Autosomal STR DNA testing is a common and well-established form of DNA testing. See *People v. Lee,* 212 Mich.App. 228, 261–283, 537 N.W.2d 233 (1995) (discussing an older DNA testing method). It involves testing areas on autosomal chromosomes in the sample. Autosomal chromosomes do not include the X and Y chromosomes, which are the sex chromosomes found in humans. Y–STR DNA testing is a more specific form of DNA testing that involves testing only the Y chromosome, which is only found in males. As discussed in more detail later, we hold that the trial court correctly determined that Y–STR DNA testing possesses the same hallmarks of reliability that have led courts to allow the admission of evidence of autosomal DNA testing.

11 Amplification is necessary because of the small amount of DNA in a sample. It involves producing additional copies of the DNA of interest through a chemical process.

12 Vitta explained that before the USYSTR database was used in case work, population geneticists examined it to ensure "that it meets the criteria for use for calculating these frequency estimates." Vitta added that "different peer review articles" concerning the USYSTR database reflected its acceptance in the scientific community.

13 According to Vitta, the confidence interval signified "how accurate the calculation, the ultimate frequency estimate is...."

14 See, e.g., *State v. Maestas,* 2012 UT 46, ¶¶ 130–136, 299 P.3d 892 (2012); *People v. Stevey,* 209 Cal.App.4th 1400, 1410–1416, 148 Cal.Rptr.3d 1 (2012); *State v. Calleia,* 414 N.J.Super. 125, 147–149, 997 A.2d 1051 (App.Div., 2010), rev'd on other grounds 206 N.J. 274, 20 A.3d 402 (2011); *State v. Bander,* 150 Wash.App. 690, 718, 208 P.3d 1242 (2009); *Curtis v. State,* 205 S.W.3d 656, 661 (Tex.App., 2006). See also *State v. Metcalf,* 2012–Ohio–674, 2012 WL 562408 (Ohio App., 2012).

15 The text of CJI2d 5.4 provided:

(1) *[Name witness]* says [he / she] took part in the crime that the defendant is charged with committing.

[Choose as many of the following as apply:]

[(a) (*Name witness*) has already been convicted of charges arising out of the commission of that crime.]

[(b) The evidence clearly shows that (*name witness*) is guilty of the same crime the defendant is charged with.]

[(c) (*Name witness*) has been promised that (he / she) will not be prosecuted for the crime the defendant is charged with committing based upon any information derived directly or indirectly from the witness's truthful testimony. The witness may be prosecuted if the prosecution obtains additional, independent evidence against the witness.]

[(d) (*Name witness*) has been promised that (he / she) will not be prosecuted for the crime the defendant is charged with committing.]

(2) Such a witness is called an accomplice.

Effective March 1, **2014**, the applicable instruction became M. Crim. J.I. 5.4. MCR 2.512(D)(2).

16 The text of CJI2d 5.6 provided:

(1) You should examine an accomplice's testimony closely and be very careful about accepting it.

(2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

(3) When you decide whether you believe an accomplice, consider the following:

(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

(b) Has the accomplice been offered a reward or been promised anything that might lead [him / her] to give false testimony? *[State what the evidence has shown. Enumerate or define reward.]*

(c) Has the accomplice been promised that [he / she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his / her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

Effective March 1, **2014**, the applicable instruction became M. Crim. J.I. 5.6. MCR 2.512(D)(2)

17 Now M. Crim. J.I. 5.7.

18 The trial court instructed the jury as follows with respect to Watson's status as an addict informer:

You have heard the testimony of Tonia Watson who has given information to the police in this case. The evidence shows that she is addicted ... to drugs, namely heroin and cocaine.

You should examine the testimony of an addicted informer closely and be very careful about accepting it. You should think about whether the testimony is supported by other evidence because then it may be more reliable.

However, there's nothing wrong with the prosecutor using an addicted informer as a witness. You may convict the defendant based on such a witness' testimony alone if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

When you decide whether to believe Tonia Watson consider the following. Did the fact that this witness is addicted to drugs affect her memory of events or ability to testify accurately[*?*] *Does the witness' addiction give her some special reason to testify falsely* [*?*] *Does the witness expect a reward or some special treatment or has she been offered a reward or been promised anything that might lead to her giving false testimony* [*?*] *Has the witness been promised that she will not be prosecuted for any charge or promised a lighter sentence or allowed to plead guilty to a less serious charge*[*?*] *If so, could this have influenced her testimony*[*?*] *Does the witness have a past criminal record*[*?*] *In general, you should consider an addicted informer's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.* [Emphasis added.]

19 A defendant may file a pro se brief pursuant to Administrative Order No. 2004–6, Standard 4.

20 It appears that defendant is referring to an alleged withdrawal from drugs.

STATE OF MICHIGAN

DEPARTMENT OF STATE POLICE

FORENSIC SCIENCE DIVISION

Lansing Laboratory
7320 N. Canal Rd
Lansing, MI 48913
(517) 322-6600
FAX (517) 322-5508

LABORATORY REPORT

Laboratory No.	: [redacted]	Record No.	: 3
Investigating Ofcr.	: Jeffery Rodgers	Date Received	: July 5, 2012
Agency	: Michigan Department of State Police – Caro Post	Time Received	: 2:52 p.m.
Agency No.	: [redacted]	Date Completed	: August 21, 2012

Nature of Offense:

1000-1 - Kidnapping/Abduction

Victim:

[redacted]

Suspect:

[redacted]

Evidence:

BP12-2177-1A1x	[redacted] - DNA extract
BP12-2177-1F1x	inner thigh/pubic area from [redacted] - DNA extract
BP12-2177-14A1x	[redacted] - DNA extract
BP12-2177-14B1x	penile swabs from [redacted] DNA extract
BP12-2177-15Ax	underwear from [redacted] - DNA extract

Results of Examination:

Deoxyribonucleic acid (DNA) recovered from the above submitted sample(s) was processed using the polymerase chain reaction (PCR) and the PowerPlex® 16 HS System (genetic loci D3S1358, TH01, D21S11, D18S51, Penta E, D5S818, D13S317, D7S820, D16S539, CSF1PO, Penta D, Amelogenin, vWA, D8S1179, TPOX, and FGA).

Conclusions:

The DNA types obtained from item BP12-2177-1F1x (inner thigh/pubic area from [redacted] - DNA extract) indicate that at least two donors are associated with this sample.

The DNA types associated with item BP12-2177-1F1x (inner thigh/pubic area from [redacted] DNA extract) are consistent with being a mixture of DNA types from item BP12-2177-1A1x ([redacted] - DNA extract) as the major donor and an unidentified minor male donor.

This report contains the conclusions, opinions and/or interpretations of the analyst whose signature appears on the report. The relevant supporting data upon which the expert opinion or inference was made are available for review/inspection.

Item BP12-2177-14A1x ([redacted]- DNA extract) is excluded as being a major donor to the DNA obtained from item BP12-2177-1F1x (inner thigh/pubic area from [redacted]- DNA extract).

The limited DNA results detected from the minor male donor are insufficient for conclusive association purposes; therefore no comparisons can be made.

No DNA foreign to item BP12-2177-14A1x ([redacted]- DNA extract) was observed from item **BP12-2177-14B1x (penile swabs from [redacted]- DNA extract).**

Item BP12-2177-1A1x ([redacted]- DNA extract) is excluded as being a donor to the DNA obtained from item BP12-2177-14B1x (penile swabs from [redacted]- DNA extract).

The DNA types obtained from item **BP12-2177-15Ax (underwear from [redacted]- DNA extract)** indicate that at least three donors are associated with this sample.

The DNA types associated with item BP12-2177-15Ax (underwear from [redacted]- DNA extract) are consistent with being a mixture of DNA types from item BP12-2177-14A1x ([redacted]- DNA extract) and additional minor donors.

The limited DNA results detected from the minor donors are insufficient for conclusive association purposes; however, they may be used for exclusionary purposes.

No conclusive determination can be made regarding item BP12-2177-1A1x ([redacted]- DNA extract) being a potential donor to the DNA types obtained from item BP12-2177-15Ax (underwear from [redacted] - DNA extract).

Remarks:

The DNA types obtained from items BP12-2177-1F1x (inner thigh/pubic area from [redacted]- DNA extract), BP12-2177-14B1x (penile swabs from [redacted]- DNA extract), and BP12-2177-15Ax (underwear from [redacted]- DNA extract) are not eligible for entry into the casework database of the Combined DNA Index System (CODIS).

Item BP12-2177-1F1x (inner thigh/pubic area from [redacted] - DNA extract) may be suitable for Y-STR analysis, which focuses only on the male DNA in a sample. If you are interested in pursuing this case using Y-STR analysis, please contact the undersigned for more information.

Disposition of Evidence:

All DNA evidence and extracts will be returned to the submitting agency.

Laboratory No.: [redacted] Record No.: 3 Date of Report: August 21, 2012
Agency No.: [redacted]

Relevant Supporting Data:

Electropherograms, population databases
Relevant supporting data is case specific and not all of the above may be applicable in every case.

Heather R Clark

Heather Clark
Forensic Scientist
Biology Unit

August 21, 2012

cc: Valerie Bowman, Elizabeth Hunt

This report contains the conclusions, opinions and/or interpretations of the analyst whose signature appears on the report. The relevant supporting data upon which the expert opinion or inference was made are available for review/inspection.

Applied Biosystems
GeneMapper ID v3.2

HRC_080712

BP12-2177 Record 3 -hrc

Sample File	Sample Name	Panel
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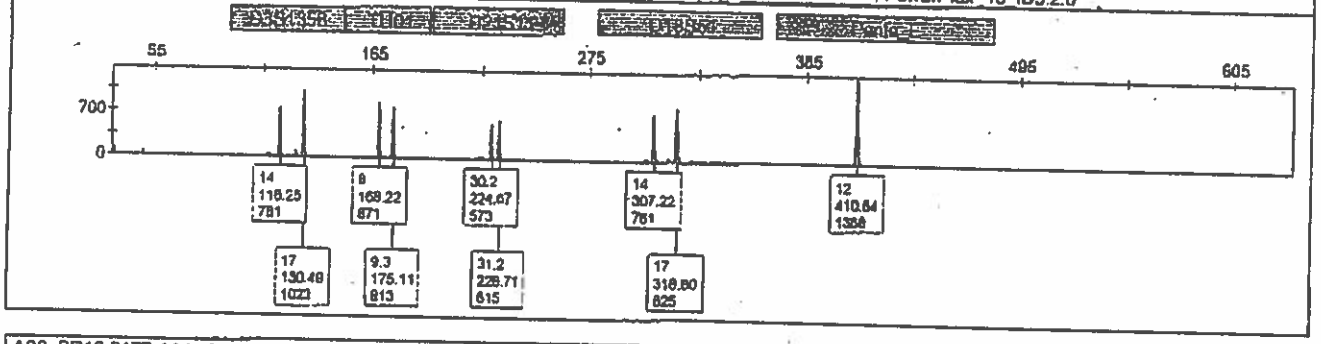
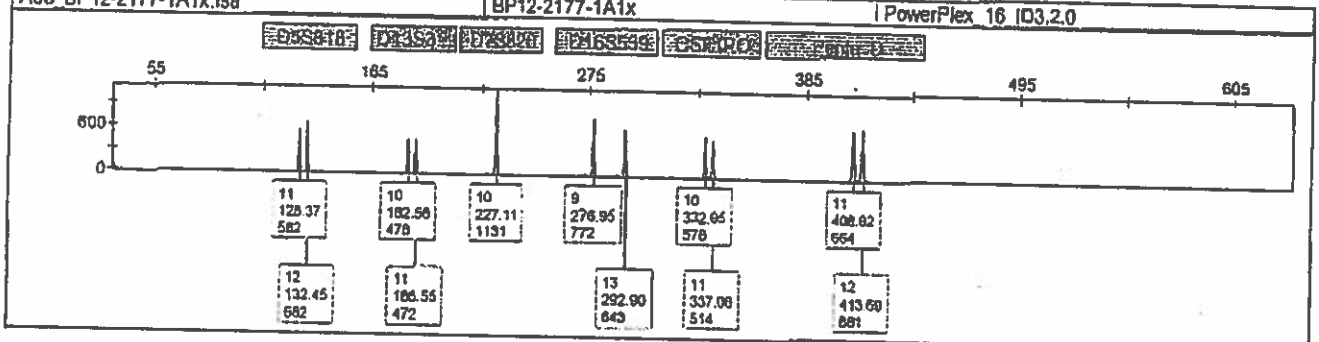
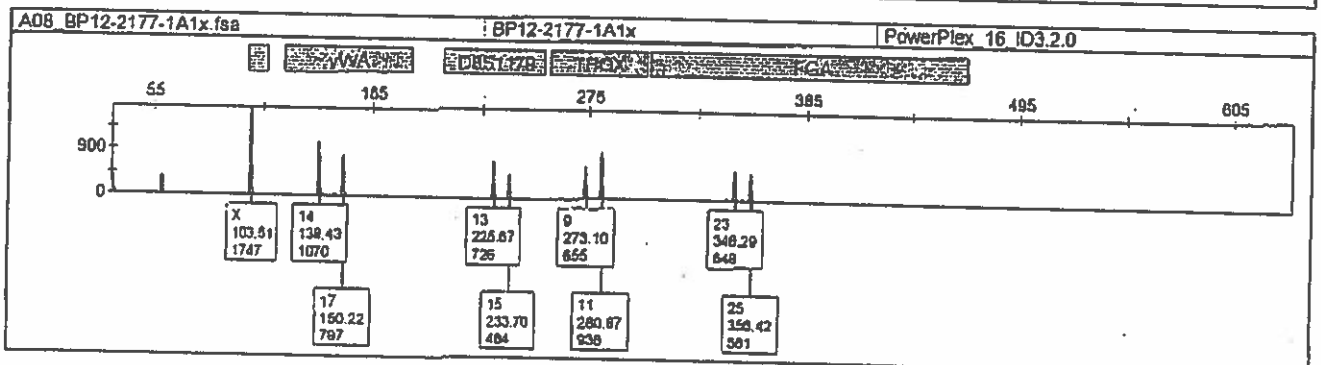


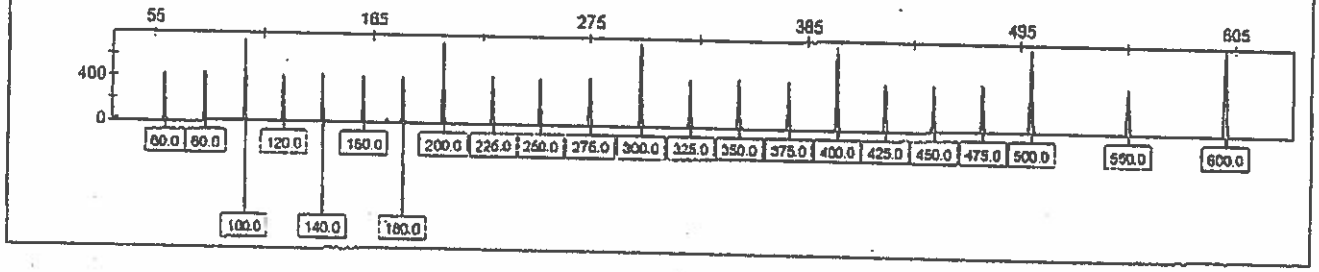
A08_BP12-2177-1A1x.fsa	BP12-2177-1A1x	PowerPlex_16_ID3.2.0



A08_BP12-2177-1A1x.fsa	BP12-2177-1A1x	PowerPlex_16_ID3.2.0



A08_BP12-2177-1A1x.fsa	BP12-2177-1A1x	PowerPlex_16_ID3.2.0



Applied Biosystems
GeneMapper ID v3.2

HRC_080712

BP12-2177 Record 3 -hrc

Sample File	Sample Name	Panel
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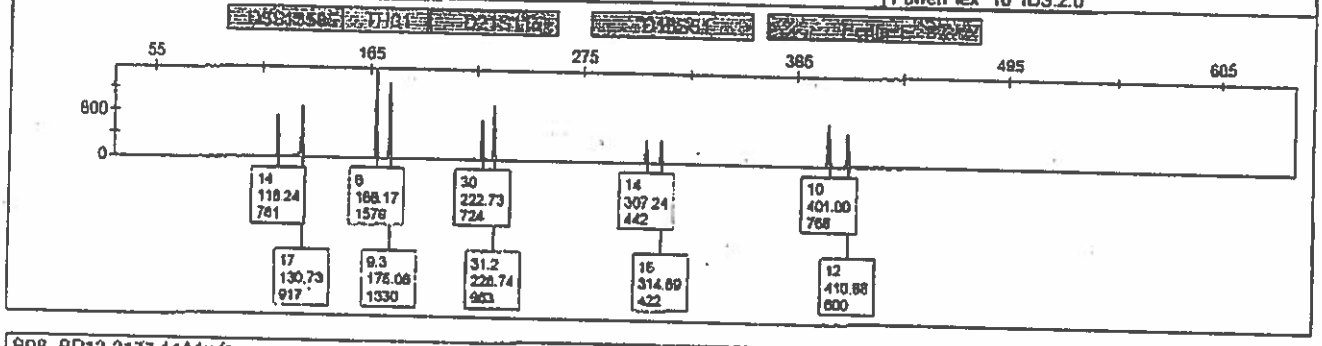

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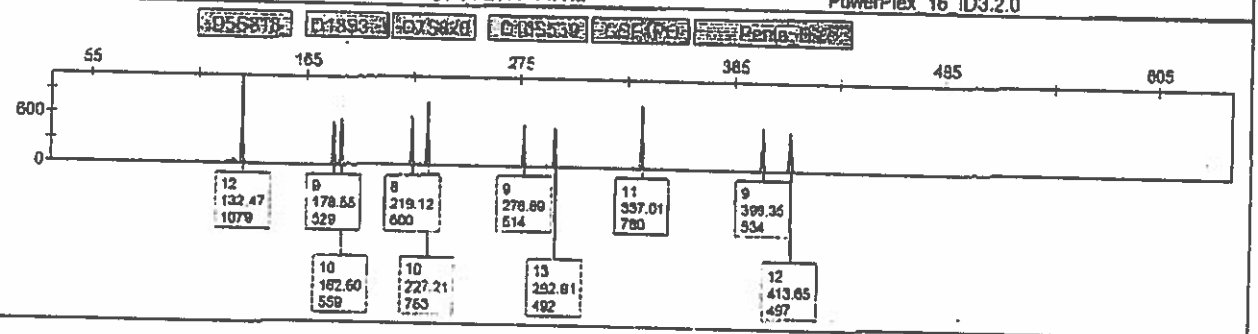

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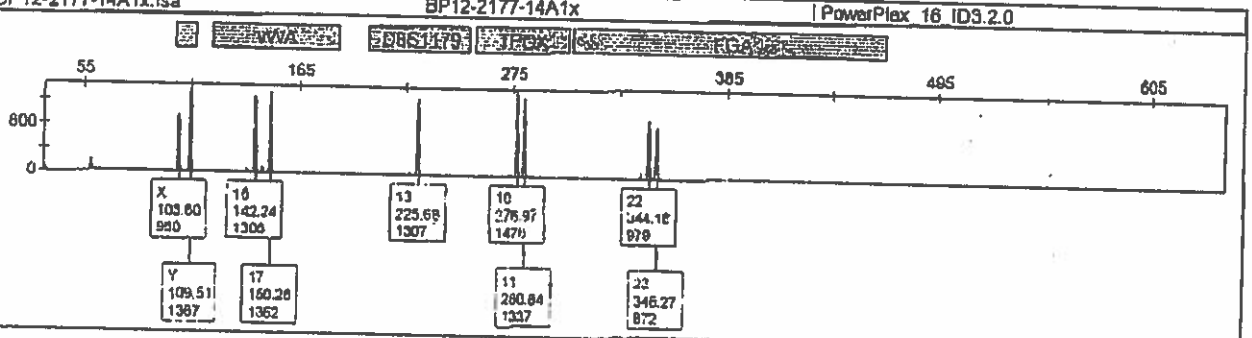

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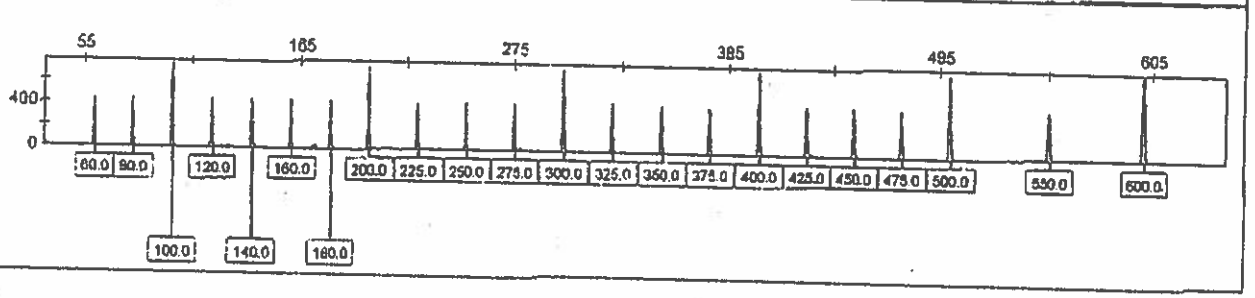

Applied Biosystems
GeneMapper ID v3.2

HRC_080712

BP12-2177 Record 3 -hrc

Sample File	Sample Name	Panel
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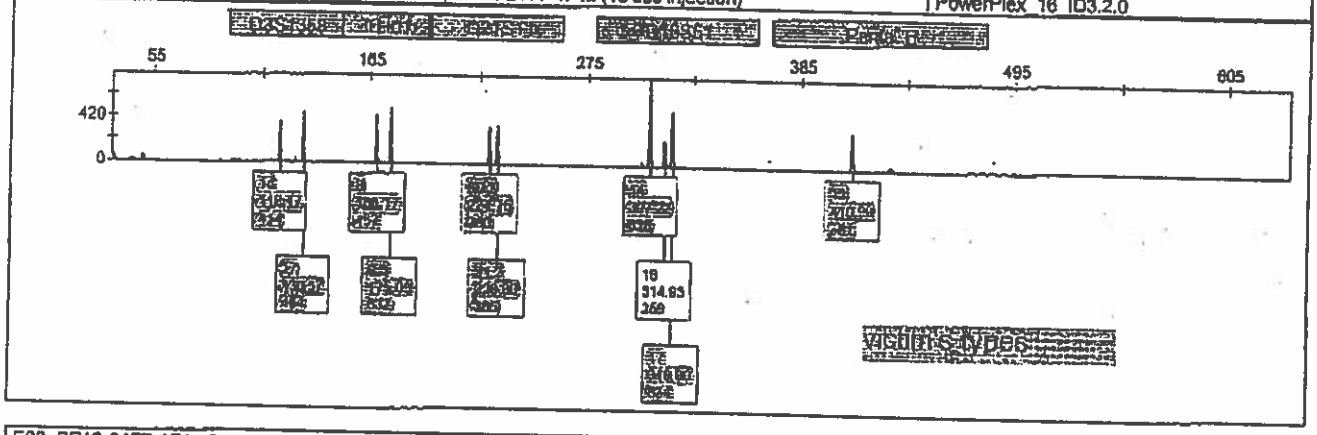
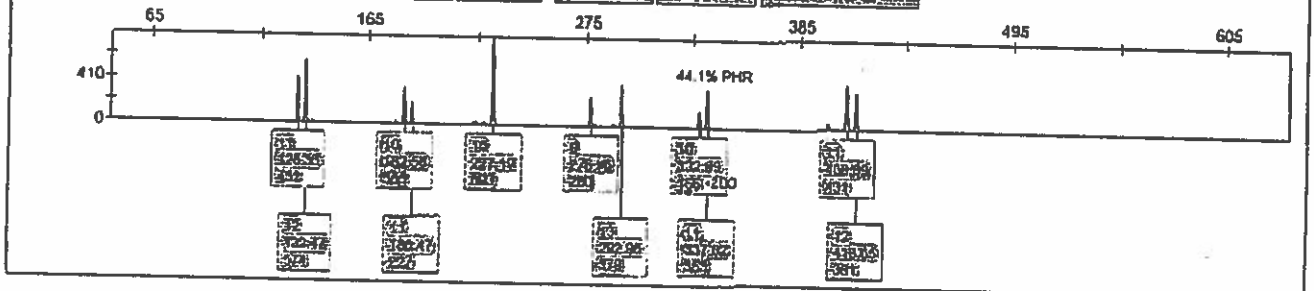
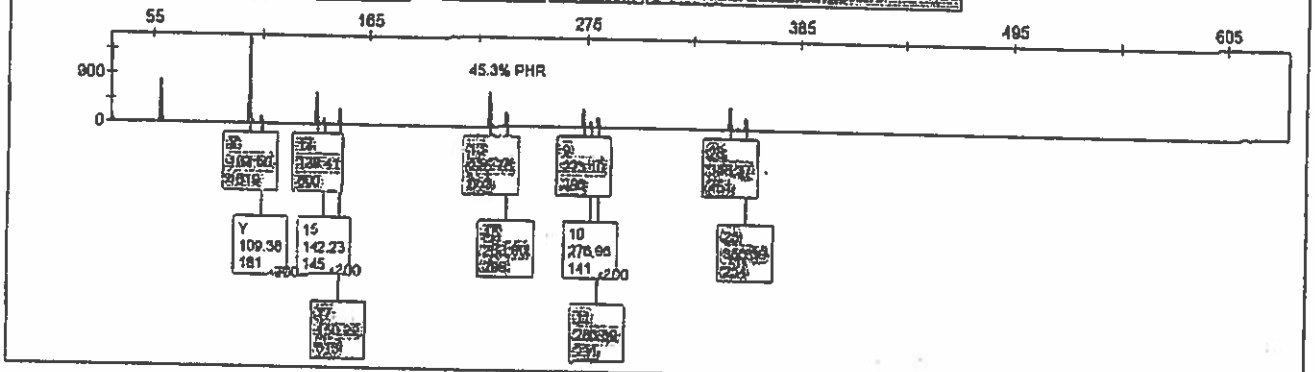


E03_BP12-2177-1F1x.2.fsa | BP12-2177-1F1x (10 sec injection) | PowerPlex_16_ID3.2.0



E03_BP12-2177-1F1x.2.fsa | BP12-2177-1F1x (10 sec injection) | PowerPlex_16_ID3.2.0

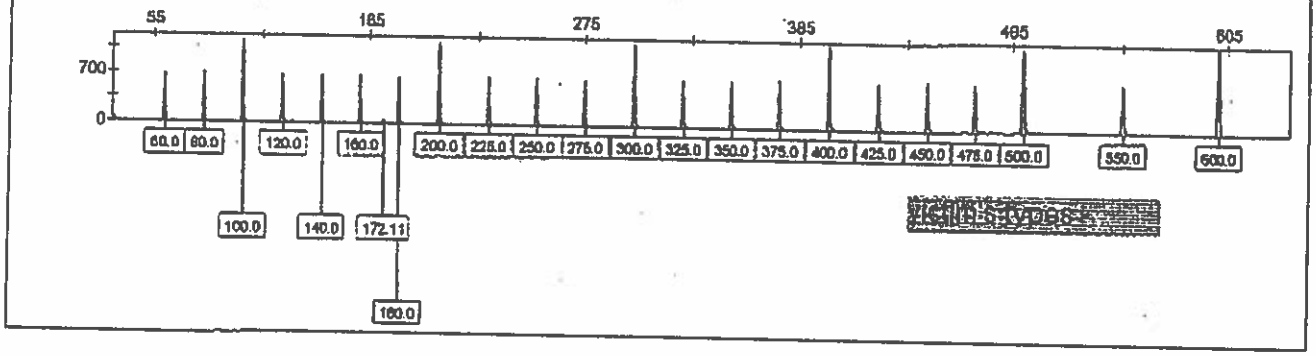


Applied Biosystems
GeneMapper ID v3.2

HRC_080712

BP12-2177 Record 3 -hrc

Sample File	Sample Name	Panel
E03_BP12-2177-1F1x.2.fsa	BP12-2177-1F1x (10 sec injection)	PowerPlex_16_ID3.2.0



STATE OF MICHIGAN

DEPARTMENT OF STATE POLICE

FORENSIC SCIENCE DIVISION

Lansing Laboratory
7320 N. Canal Rd
Lansing, MI 48913
(517) 322-6600
FAX (517) 322-5508

LABORATORY REPORT

Laboratory No.	:	[redacted]	Record No.	:	6
Investigating Ofcr.	:	Jeffery Rodgers	Date Received	:	July 5, 2012
Agency	:	Michigan Department of State Police	Time Received	:	2:52 p.m.
Agency No.	:	[redacted]	Date Completed	:	September 7, 2012

Nature of Offense:

1000-1 - Kidnapping/Abduction

Victim:

[redacted]

Suspect:

[redacted]

Evidence:

BP12-2177-1F1x	inner thigh/pubic area from [redacted] - DNA extract (*previously extracted and analyzed under record 3)*
BP12-2177-14A1x	[redacted] - DNA extract *(previously extracted and analyzed under record 3)*

Results of Examination:

Deoxyribonucleic acid (DNA) recovered from the above submitted samples was processed using the polymerase chain reaction (PCR) and the PowerPlex® Y System (genetic loci DYS19, DYS385a/b, DYS389I/II, DYS390, DYS391, DYS392, DYS393, DYS437, DYS438 and DYS439).

Conclusions:

The partial Y-STR haplotype identified from item BP12-2177-1F1x (inner thigh/pubic area from [redacted] matches the Y-STR haplotype obtained from item BP12-2177-14A1x ([redacted]) at loci DYS389I and DYS438. Using a 95% confidence interval, the partial Y-STR haplotype observed in item BP12-2177-1F1x (inner thigh/pubic area from [redacted]) was searched against a known database and would be expected to be observed in:

Population Database	Haplotype Frequency
Caucasian males	1 in 2
African American males	1 in 6
Hispanic males	1 in 3

No conclusive determination can be made regarding item BP12-2177 ([redacted]) being a potential donor at the genetic locus DYS385 a/b for this evidence.

This report contains the conclusions, opinions and/or interpretations of the analyst whose signature appears on the report. The relevant supporting data upon which the expert opinion or inference was made are available for review/inspection.

Remarks:

Population statistics are offered to estimate the frequency of occurrence of the reported Y-STR haplotype in the general population. Y-STR markers are found on the non-recombining region of the Y chromosome. The markers are said to be linked because recombination does not generally occur. The counting method is used for these reasons. The Y-STR database located at http://usystrdatabase.org is utilized to estimate the frequency of the haplotype in the general population.

Disposition of Evidence:

All DNA evidence and extracts will be returned to the submitting agency.

Relevant Supporting Data:

Electropherograms, population databases
Relevant supporting data is case specific and not all of the above may be applicable in every case.

Cassandra L Campbell

Cassandra Campbell
Forensic Scientist
Biology Unit

September 7, 2012

cc: Valerie Bowman, Pros. Jim Young, Elizabeth Hunt

BP12-2177-1F1x BP12-2177 rec. 6

US Y-STR Database

Release: 3.0 | Last Updated: 07/29/2012

Select Alleles
Input Haplotype(s) From Your File
Mixture Analysis Tools

Common Markers

DYS19	DYS385	DYS389I	DYS389II
DYS390	DYS391	DYS392	DYS393
DYS437	DYS438	DYS439	DYS448
DYS456	DYS458	DYS635 (YGATAC4)	YGATAH4
DYS481	DYS533	DYS549	DYS570
DYS576	DYS643		

DYS389I: 13
DYS438: 12

Search By Ancestry

All
African American
Asian
Caucasian

Search Reset

Results: Show Details

Overall Database Summary:

The selected haplotype is found in 6598 of 23419 total individuals within the database with a frequency of 0.281737. Thus, the selected haplotype occurs in approximately 1 in every 4 individuals.

Applying the 95% upper confidence interval results in a frequency of 0.286600, which is equivalent to approximately 1 in every 3 individuals.

The selected haplotype is found in 1159 of 6976 African American individuals within the database, with a frequency of 0.166141. Thus, the selected haplotype occurs in approximately 1 in every 6 individuals. Applying the 95% upper confidence interval results in a frequency of 0.17364, which is equivalent to approximately 1 in every 6 individuals.

The selected haplotype is found in 41 of 1200 Asian individuals within the database, with a frequency of 0.034167. Thus, the selected haplotype occurs in approximately 1 in every 29 individuals. Applying the 95% upper confidence interval results in a frequency of 0.0441, which is equivalent to approximately 1 in every 23 individuals.

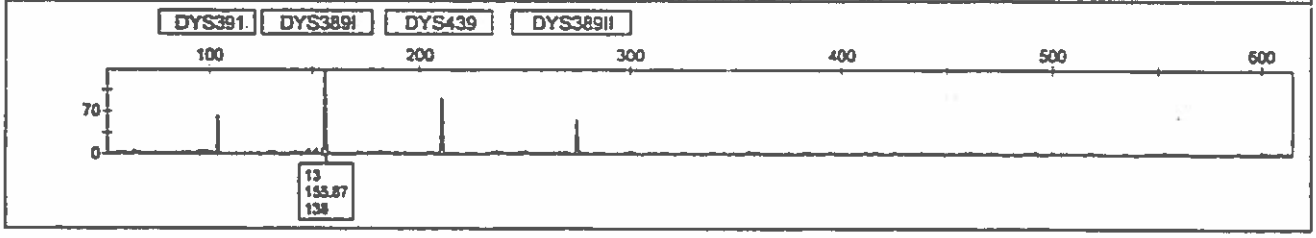
The selected haplotype is found in 3889 of 9411 Caucasian individuals within the database, with a frequency of 0.413240. Thus, the selected haplotype occurs in approximately 1 in every 2 individuals. Applying the 95% upper confidence interval results in a frequency of 0.42166, which is equivalent to approximately 1 in every 2 individuals.

The selected haplotype is found in 1212 of 4327 Hispanic individuals within the database, with a frequency of 0.280102. Thus, the selected haplotype occurs in approximately 1 in every 4 individuals. Applying the 95% upper confidence interval results in a frequency of 0.29154, which is equivalent to approximately 1 in every 3 individuals.

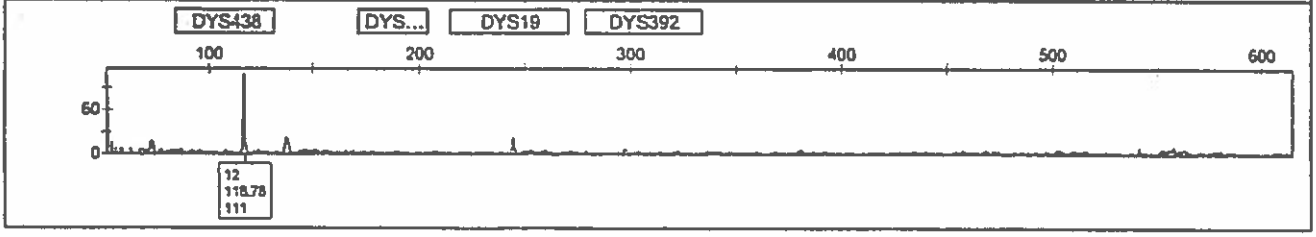
The selected haplotype is found in 297 of 1505 Native American individuals within the database, with a frequency of 0.197342. Thus, the selected haplotype occurs in approximately 1 in every 5 individuals. Applying the 95% upper confidence interval results in a frequency of 0.21498, which is equivalent to approximately 1 in every 5 individuals.

10 second injection

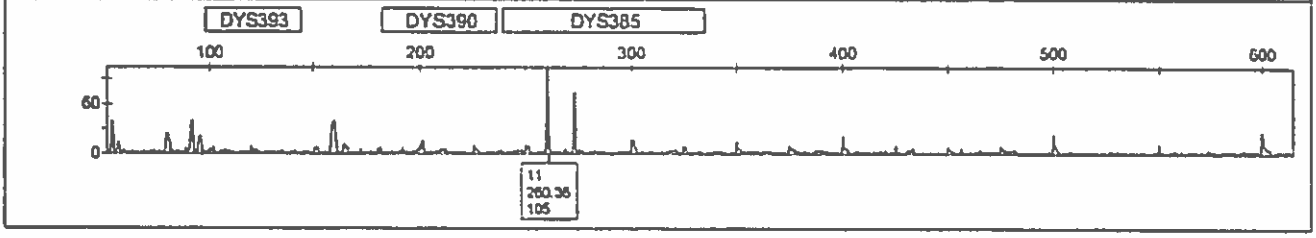
Sample File	Sample Name	Panel
D01_BP12-2177-1F1x.2.fsa	BP12-2177-1F1x	PowerPlex_Y_ID3.2.0



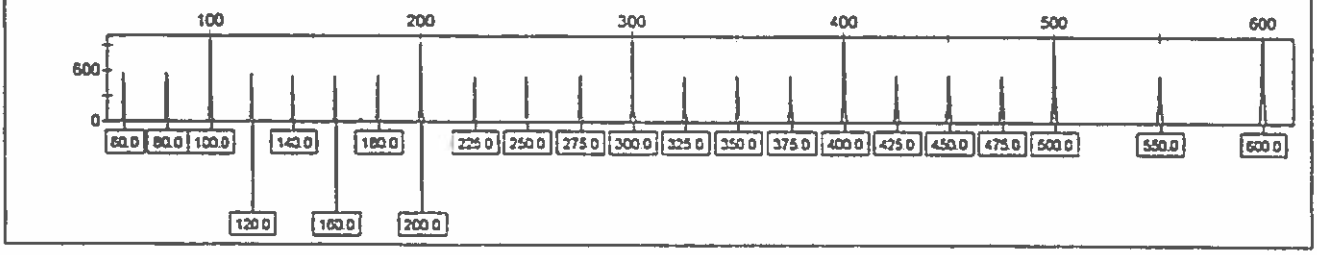
D01_BP12-2177-1F1x.2.fsa	BP12-2177-1F1x	PowerPlex_Y_ID3.2.0



D01_BP12-2177-1F1x.2.fsa	BP12-2177-1F1x	PowerPlex_Y_ID3.2.0



D01_BP12-2177-1F1x.2.fsa	BP12-2177-1F1x	PowerPlex_Y_ID3.2.0



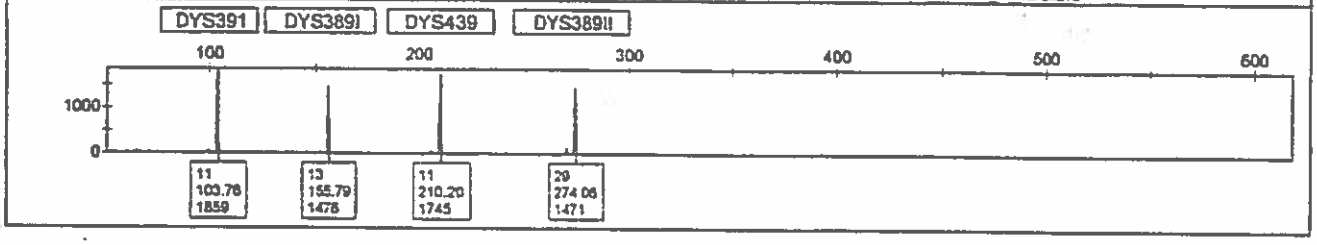
Applied Biosystems
GeneMapper ID v3.2.1

CLC(KW)_090612 CC

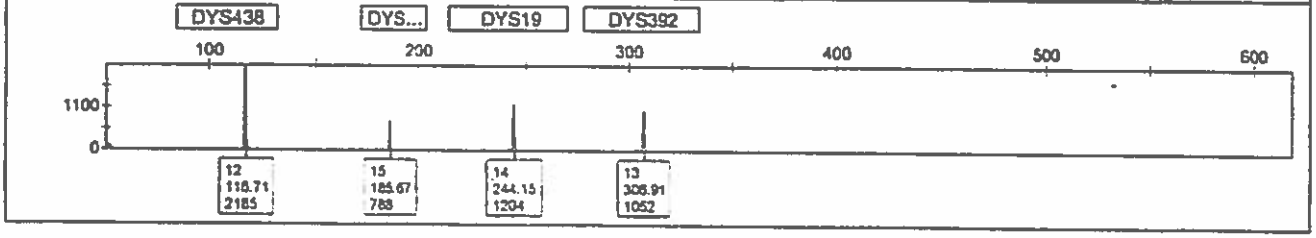
BP12-2177 rec. 6

2 second injection

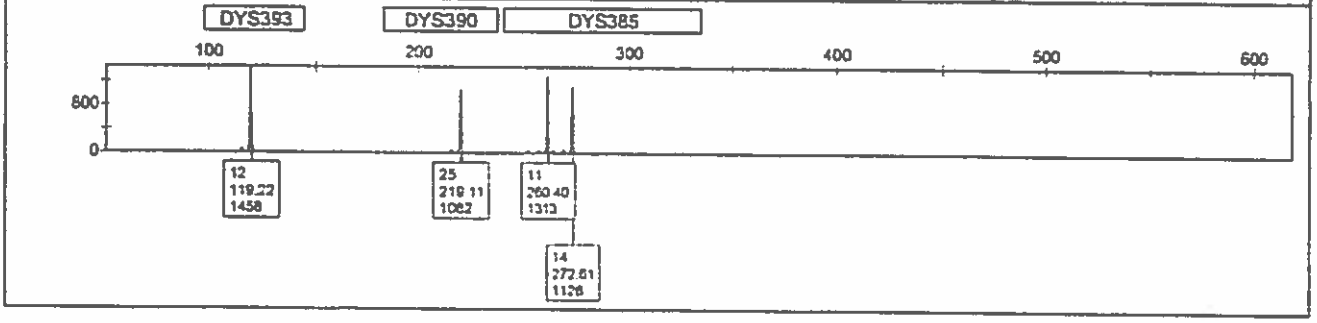
Sample File	Sample Name	Panel
A02_BP12-2177-14A1x.2.fsa	BP12-2177-14A1x	PowerPlex_Y_ID3.2.0



A02_BP12-2177-14A1x.2.fsa	BP12-2177-14A1x	PowerPlex_Y_ID3.2.0



A02_BP12-2177-14A1x.2.fsa	BP12-2177-14A1x	PowerPlex_Y_ID3.2.0



A02_BP12-2177-14A1x.2.fsa	BP12-2177-14A1x	PowerPlex_Y_ID3.2.0