

2005

Utah v. Vos : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. : Case No. 20050613-CA
 :
 ISIAH BO'CAGE VOS, :
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

AN APPEAL FROM A JUDGMENT AND CONVICTION FOR
MURDER, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (West
2004), IN THE THIRD JUDICIAL DISTRICT COURT IN SALT LAKE
COUNTY, THE HONORABLE J. DENNIS FREDERICK, PRESIDING

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UTAH APPELLATE COURT

AUG 25 2006

STATE OF UTAH

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November 21, 2006

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Clerk of the Court
Utah Court of Appeals
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PO BOX 140230
Salt Lake City, UT 84114-0230

Re: *State v. Isiah Bo 'Cage Vos*, Case No. 20050613-CA
Request for Oral Argument

Dear Ms. Collins:

Briefing has been completed in the above case, with defendant's reply brief being filed on October 27, 2006. I've recently noted that the State's brief did not request oral argument. This was an oversight. This appeal raises an issue of first impression in this jurisdiction. Thus, the State believes that oral argument would be beneficial for the Court. Please consider this letter as a request that the Court set the matter for oral argument.

Sincerely,

Laura B. Dupaix
Assistant Attorney General

cc: John Pace, counsel for defendant/appellant

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ISIAH BO'CAGE VOS,	:	
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Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

Defendant appeals from his conviction for murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (West 2004). This Court has jurisdiction under the pour-over provisions of Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

STATEMENT OF ISSUES
AND STANDARDS OF REVIEW

Issue No. 1: Was defendant's pre-trial attorney constitutionally ineffective when he encouraged defendant to admit his involvement in a witnessed shooting early on as part of a strategy to advance a credible claim of self-defense?

Standard of Review: "When a trial court has previously ruled on an ineffective assistance of counsel claim, the issues raised present mixed questions of law and fact." *State v. Kooyman*, 2005 UT App 222, ¶ 16, 112 P.3d 1252 (internal quotation marks and citation

omitted), *cert. denied*, 125 P.3d 102 (Utah 2005). The trial court's findings are reviewed for clear error and its legal conclusions for correctness. *Id.*

Issue No. 2: Are *Miranda* warnings necessary where defense counsel initiates an interview with police, defendant has an opportunity to consult with counsel before giving a statement, and counsel is present throughout the interview?

Standard of Review: On appeal, "the trial court's factual findings underlying the denial of a motion to suppress" are reviewed for "clear error, while conclusions of law are reviewed for correctness." *State v. Galli*, 967 P.2d 930, 933 (Utah 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of the following constitutional provisions are attached at **Addendum A**:

U.S. Const., amend. V;
U.S. Const., amend. VI

STATEMENT OF THE CASE

On October 26, 2004, defendant was charged with murder, a first degree felony. R1-3. Five days after his arrest, on his attorney's advice and in his attorney's presence, defendant waived his *Miranda* rights and confessed to the killing, but claimed that he had acted in self-defense. *See* R258:42; R259:8-13, 20-30.

Defendant retained new counsel, who moved to suppress defendant's confession, alleging that it had been taken in violation of *Miranda*, was not knowingly or voluntarily given, and was based "on grossly ineffective legal advice." R64. After holding an evidentiary hearing, the trial court denied the motion. R76, 99, 115-20.

A jury convicted defendant as charged. R167-84, 189-91, 206.¹ The trial court imposed a five-years-to-life prison term, with a consecutive one-year firearm enhancement. R215-16; R262:10. Defendant timely appealed to the Utah Supreme Court, which transferred the case to this Court. *See* 215, 222, 254.

STATEMENT OF FACTS²

The shooting

Drivers were startled on October 21, 2004, to see a shooting near the intersection of 700 North and Star Crest Drive in Salt Lake City. R260:40-43, 107-10, 149-50. It was about 4:30 p.m. and still light out. R260:49, 107, 114, 149.

Melissa Adams was waiting to turn left onto Star Crest Drive from 700 North when she saw a green car pull up to the curb and the driver get out. R260:107. The driver walked to the back of his car, towards a pedestrian walking down the street. R260:107-08. As Adams started to turn, she saw the pedestrian pull out a gun and shoot at the driver, who by this time had reached the midpoint of his car trunk. R260:108. The two men were about five to six feet apart, but it looked like the driver was starting to retreat back around his car and

¹The trial court sealed all information in the record containing identifying information of individual jurors, because during trial, defendant and others inquired about juror ingress and egress from the courthouse, and because jurors had voiced concerns that defendant, and possibly others, appeared to be writing down their names. *See* R209. Thus, the verdict forms are in a sealed envelope. *See* R206.

²Unless otherwise stated, the following facts are recited in the light most favorable to the jury verdict. *See State v. Kruger*, 2000 UT 60, ¶ 2, 6 P.3d 1116.

that the pedestrian was pursuing him. R260:108-09, 117-18. As Adams completed her turn, she heard four to five shots. R260:108.

About a block north of the shooting, Adams saw the shooter—through her rear view mirror—get into a teal Ford Explorer. R260:109, 119. Adams returned to the scene of the shooting to check on the driver of the green car. R260:110. On her way back, she passed the Explorer. R260:109-10. She looked for a plate number, but the Explorer had no plates. *Id.* When Adams arrived back at the scene, she found the driver lying unresponsive on a driveway. R260:110-11. She called 911 on her cell phone. R260:110-11.

Jenness Wood also saw the shooting. R260:44-45. She was turning right onto 700 North from Star Crest Drive when she heard “[p]ops . . . like a cap gun.” R260:40. She looked around to see two people in a driveway “running between the cars, onto the lawn, and the one in the lead had turned around and was about 4 to 6 feet away from the one chasing him.” R260:40. The man being pursued was “larger” and had his “hands up.” R260:41. The pursuer was pointing a gun at the larger man. R260:41-42. Ms. Wood drove on because she “couldn’t believe” that she had just seen a shooting. R260:42-43. She later called police when she learned that someone had been killed.³ R260:43.

³ There were several other witnesses to the shooting, *see* R259:17 (“seven or eight”), but only three testified: Melissa Adams, Jenness Wood, and Robert Knudsen, who was called by the defense, *see* R260:148-55. Knudsen saw only part of the altercation. R260:148. Knudsen was stopped at the light, about three cars back, on the corner of 700 North and Star Crest Drive. R260:150. When the light turned green and no one moved, Knudsen turned into the left lane to go around. *Id.* He saw two men, one chasing the other. *Id.* Knudsen slowed and watched in his rear view mirror. According to Knudsen, the pursuer lifted his arm and Knudsen could see the butt of the gun, but not the barrel. *Id.* The other man, who was larger, had his hands raised above his head.

The scene

The scene was secured by the time homicide detective Cordan Parks arrived, between 5:10 and 5:15 p.m. R260:74-75. The victim, later identified as Jeffrey Maestas, lay under a sheet in the driveway where he had fallen. R260:73-75. He had died from four .22 caliber bullet wounds—two to the front of his body and two to the back. R260:61, 69. Each of the bullet wounds was potentially fatal. R260:62-66.

Police found no weapons on Maestas's person, but found a wooden baseball bat on the front right passenger floor of his green Ford Taurus. R260:75-80. The Taurus was still running, with the keys in the ignition and both front windows down. R260:77-80.

The police suspect defendant

Although no single witness to the shooting could identify defendant as the gunman, defendant was a suspect within an hour of Detective Parks' arrival on the scene. R260:74-75, 86-87. Defendant's former little league football coach informed police at the scene that he had seen defendant a few minutes after 4:30 p.m., walking south on Star Crest Drive toward 700 North. R260:51-53. Defendant was then only about a block away from the shooting scene. R260:51-53. Gang detectives also gave Detective Parks information suggesting that defendant, a member of the Black Mafia Gangsters ("BMG"), might be the shooter. R260:82-86. Based on that information, detectives immediately tried to contact defendant, but no one was at his home and the car was gone. R260:86.

R260:151-52. Knudsen did not hear any shots and drove on. R260:152. He called police after he saw the news at home. *Id.*

Meanwhile, police began looking for the teal Ford Explorer that the shooter had entered immediately after the killing. R260:87. The gang squad found it the following morning, at about 1:30 a.m., at the owner's address. R260:87. At about 4:00 a.m., police found the owner, Anthony Ferguson, and his girlfriend staying at a motel. R260:89. Ferguson told police that defendant was the person who had "come jumped into his Ford Explorer" the day before at Star Crest and 700 North. R260:90. Based on Ferguson's statement, police broadcast an attempt to locate defendant.⁴ R260:89.

Defendant retains counsel, turns himself in, and gives a statement

Later that day, defendant's attorney, John Bucher, arranged for defendant to turn himself in at Bucher's office. R260:91, 98. Police arrested defendant and booked him into jail, but did not interview him. R260:91, 98-99. Five days later, on October 27, 2004, Mr. Bucher arranged for Detective Parks to interview defendant at the jail. R260:92-93.

Defendant told Detective Parks that he shot Maestas in self-defense. R260:93-95. Defendant said that his house had recently been shot at three times and that two weeks earlier, Maestas, a member of the Salt Lake Posse Gang, had admitted to shooting at defendant's house and had threatened to kick open defendant's door, shoot his mother in the face, and kill defendant. R260:100-01.

⁴Although subpoenaed, Ferguson failed to appear at trial and therefore did not testify. R260:123-24. His identification of defendant, however, came in without objection through Detective Parks' testimony, R260:87-90, 103-04, and later through defendant's own testimony, R261:201.

Defendant told Parks that on the day of the shooting, Maestas had made a "U" turn, pulled over, and threatened to kill defendant. R260:102. Defendant then claimed that Maestas reached down towards the floorboard as if to grab something, jumped out of his car, and again threatened defendant. R260:102. Defendant alleged that because he was afraid for his life, he pulled out his gun and told Maestas to stop. R260:103. According to defendant, when Maestas continued to approach and threaten to kill him, defendant pulled the trigger until he had emptied his gun. R260:103.

Defendant admitted to Detective Parks that he had fled the scene in Anthony Ferguson's teal Ford Explorer. R260:95. Defendant admitted knowing Ferguson, but claimed he appeared only coincidentally and had nothing to do with the shooting. *Id.*

The defense at trial

Defendant's trial testimony was largely consistent with his statement to Detective Parks. Defendant also called several witnesses, including his mother, and produced photographs of bullet holes and shell casings, to corroborate that in the weeks preceding the murder, his house had been shot at three times. R260:143-42, 156; Defense Exs. 11-17, 21, 24, 25. One of those shootings, which was reported to police, left several bullet holes in and around the headboard of defendant's mother's bed. R260:133-37; Defense Exs. 11, 13, 16.

Defendant and his witnesses also testified that Maestas had a reputation for being violent and carrying a firearm. R260:162; R261:203, 223. According to defendant and one witness, about two weeks before the shooting, Maestas displayed a black semiautomatic and

told defendant that he was going to “smoke” whoever had shot at Maestas’s house. R261:180-81, 183.

Some defense witnesses said they were privy to a telephone conversation soon afterwards, in which Maestas accused defendant of shooting at his house. R260:130-41, 160, 182. Although defendant denied it, Maestas threatened that if it happened again, Maestas was “going to stomp your door down and shoot your f***ing mom—your mom in the f***ing face” and was “going to kill you when I see you.” R260:160; R261:194.

Another witness testified that a little over a month before the shooting, Maestas told him that Maestas was going to kill defendant for shooting up his house. R261:225. Maestas showed this witness two guns. R261:225. The witness relayed this conversation to defendant. R261:226. About three days later, defendant’s house was shot at. *Id.* Maestas told the witness that he was the one who had shot up defendant’s house. *Id.* The witness also conveyed this conversation to defendant. *Id.*

Defendant claimed at trial that on the day of the shooting, he was waiting for his girlfriend at the bus stop near 700 North and Star Crest Drive, when Maestas drove by, talking on his cell phone. R261:195-96. Maestas saw defendant, “got excited,” hung up, and made a U turn.⁵ R261:196. Defendant testified that he believed that Maestas was going to shoot him and so began walking away. R261:197. According to defendant, Maestas pulled

⁵At trial, the parties stipulated that a long-time friend of Maestas told police that he was the person talking to Maestas on the phone at the time and that Maestas suddenly interrupted their conversation with, “Here’s a n***er, I’ll call you right back.” R260:130-31.

up to the curb, with his passenger window down, and began yelling, "Oh, yes, you are that mother f***er. I got you now, yeah, bitch." R261:197.

Defendant claimed that he began walking the other way, but that Maestas "slammed the car in park," reached under his seat, jumped out of the car, and "came running around, back of that car, where I couldn't see his hand." R261:197. Defendant stated that Maestas had his hand behind his back. R261:197. Defendant testified that when Maestas reached the middle of his car trunk, defendant pulled out his gun and yelled, "Stop, stop." R261:197-98.

According to defendant, when Maestas saw the gun, he did not stop, but yelled, "I am going to kill you," and "charged" at defendant with "his head down." R261:198. Defendant stated that he still could not see Maestas's hand and so started pulling the trigger. R261:198. Defendant claimed that as he fired, both he and Maestas moved in opposite directions. R261:198-99. Defendant said that he did not believe he had hit Maestas because he did not see any blood and Maestas had kept moving. R261:199-200.

Defendant explained that he started to run away, but then saw Ferguson making a left hand turn at the intersection. R261:201. Defendant flagged him down and jumped into his Ford Explorer. *Id.*

Defendant testified that he did not know until later, when he saw the news, that he had killed Maestas. R261:201-02. He immediately destroyed the gun and threw it in a dumpster. R261:202. The following day, he made arrangements through his mother and his attorney to turn himself in. *Id.* Defendant testified that four or five days later, he voluntarily gave a statement to Detective Parks, with his lawyer present. *Id.*

SUMMARY OF ARGUMENT

Issue 1: Defendant claims that Mr. Bucher was constitutionally ineffective for advising him to give a statement to the police so early in the proceedings. Defendant has not carried his heavy burden under *Strickland* to show that counsel performed deficiently and that his counsel's performance prejudiced him. First, the trial court found that Mr. Bucher's advice was "part of [a] cogent and joint strategy of [defendant] and his attorney to argue that Maestas had been killed in self-defense." Defendant has not shown that that finding is clearly erroneous. Mr. Bucher testified that when he advised defendant, he knew that witnesses could identify his client as the shooter, that the victim initiated the confrontation that led to the shooting, and that the victim had a substantiated history of threatening defendant. Based on that knowledge, Mr. Bucher reasonably determined that defendant's best strategy was to claim self-defense and that an early statement to that effect would enhance the credibility of that defense at trial. By making the statement to police, defendant could (and did) testify in line with that statement, thereby showing the jury that he had nothing to hide, he had cooperated with police from the beginning, and he was honest and forthright.

Second, defendant also has not shown that his counsel's advice, even if objectively deficient, prejudiced him. Under the circumstances of this case, self-defense was the best defense counsel could have run. Defendant has not shown that there was a reasonable probability of a better outcome if his counsel had instead opted to present an identity defense.

Issue 2: Defendant contends that his statement should have been suppressed because he did not voluntarily, knowingly, intelligently waive his *Miranda* rights. Specifically, defendant argues that he was not fully advised of his *Miranda* rights and that he did not affirmatively waive them before giving a statement.

According to *Miranda* and the overwhelming majority of courts to address the issue, counsel's presence throughout a custodial interrogation obviates the need for *Miranda* warnings. Defendant, therefore, has shown no *Miranda* violation. Even if he had, any violation was harmless beyond a reasonable doubt where police did not need the statement to prove that defendant shot and killed the victim and where defendant used the statement to advance his self-defense claim.

ARGUMENT

POINT I

DEFENDANT'S PRE-TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE FOR ADVISING DEFENDANT TO ADMIT TO A WITNESSED SHOOTING EARLY ON, AS PART OF A STRATEGY TO ADVANCE A CREDIBLE SELF-DEFENSE CLAIM⁶

Defendant argues that Mr. Bucher's pre-trial representation in advising him to waive his *Miranda* rights and to admit to the shooting early on fell below an objective standard of reasonableness. Defendant asserts that Mr. Bucher did not adequately investigate before advising him to give a statement to police, nor did he ensure that defendant knowingly and voluntarily waived his *Miranda* rights. Br. Aplt. 13-25. Defendant alleges that Mr. Bucher's

⁶This point responds to Points I, II, and III of defendant's brief.

performance in advising him was also deficient because it usurped his right to decide the objectives of the litigation and it violated his attorney-client privilege. *Id.* at 14-18.

Defendant argues that prejudice should be presumed in this case because Mr. Bucher's advice either created a conflict of interest or constructively denied him the assistance of counsel. *Id.* at 25-32. Defendant alternatively argues that Mr. Bucher's alleged deficient performance prejudiced him. *Id.* at 34-39.

As explained below, defendant has not met his heavy burden under *Strickland v. Washington*, 466 U.S. 668 (1984). First, as the trial court found below, Mr. Bucher did not perform objectively unreasonably in advising defendant to give a statement to police. Rather, Mr. Bucher's advice was "part of [a] cogent and joint strategy of [defendant] and his attorney to argue that Maestas had been killed in self-defense." R117 (Trial Court's Findings of Fact and Conclusions of Law on Defendant's Motion to Suppress, attached as **Addendum B**). Defendant has not shown that that finding is clearly erroneous.

Second, defendant has not shown prejudice. Contrary to his arguments, Mr. Bucher's advice did not create a conflict of interest, nor did it amount to a constructive denial of the assistance of counsel. Thus, prejudice is not presumed. Defendant has not shown that but for his counsel's advice, there was a reasonable likelihood of a better outcome for him.

A. Evidence presented at motion to suppress hearing.⁷

Detective Parks, John Bucher, and defendant testified at the motion to suppress hearing regarding the circumstances surrounding defendant's statement. *See* R259. Detective Parks testified that attorney John Bucher called him the afternoon of October 22, 2004, and said that he represented defendant. R259:7-8, 21. Mr. Bucher arranged for defendant to turn himself in at his office at about 4:30 p.m. that day. R259:7, 21. Police did not question defendant when they arrested him, because Mr. Bucher expressly forbade it. R259:7-8.

Mr. Bucher talked to Detective Parks either at the time of surrender or soon after, because he "wanted to know more facts about the thing." R259:22. Detective Parks told Mr. Bucher that Anthony Ferguson, the driver of the teal Ford Explorer, could identify defendant. R259:10-12, 22. Ferguson had told police that he saw defendant "fighting" with Maestas, although Ferguson claimed to have been unaware that there was a gun involved. R259:11-12. Detective Parks also told Bucher that there were other eyewitnesses to the shooting. R259:10-13. Detective Parks could not specifically recall whether he told Mr. Bucher that these other witnesses could identify defendant, but thought that he "probably" had. R259:10.

Mr. Bucher testified, however, that Detective Parks mentioned "one or two" other witnesses in addition to Ferguson, "but did not – I mean, I think he told me that they were witnesses to the shooting, but he did not tell me whether or not they knew who [defendant]

⁷Unless otherwise stated, the following facts from the suppression hearing are stated in the light most favorable to the trial court's findings. *See State v. Earl*, 2004 UT App 163, ¶ 1, n.1, 92 P.3d 167.

was. Only one person knew who [defendant] was, and that was the man that – the boy that picked him up at the crime scene.” R259:22. Mr. Bucher nevertheless testified that he had assumed that more than one person could identify defendant as the shooter. R259:28.

Over the next few days, Mr. Bucher received and reviewed “some initial discovery.” R259:25, 28. Mr. Bucher also talked “very much” with defendant. R259:28. Mr. Bucher learned from defendant that “there were people at the scene” and that the history between defendant and the victim went back several months. R259:29-30.

As Mr. Bucher explained at the suppression hearing, based on what he knew at the time, he believed defendant’s best defense would be self-defense, imperfect self-defense, “or some sort of psychological defense.” R259:23, 30. Mr. Bucher knew police did not have the murder weapon and considered this “a small defect” in their case. R259:23. “But back then, upon hearing the history of the victim and [defendant] and the identification of the witnesses, I came to the conclusion that this case should not be approached as a – as a ‘who dunnit,’ as an identification case, but that it must be approached another way” *Id.* “So pretty early in the thing,” Mr. Bucher “wanted to make a statement and tell the detective the history of the victim and [defendant].” *Id.* Mr. Bucher also testified that he hoped defendant’s statement would help him negotiate a plea agreement with the prosecution. R259:25.

Mr. Bucher contacted the prosecutor and said he wanted to have defendant interviewed because he believed he had a good self-defense claim. R259:9; Defense Ex. 1. The prosecutor told Mr. Bucher to contact Detective Parks to set up the interview. *Id.*

Consequently, on October 27, 2004, Mr. Bucher called Detective Parks to tell him that defendant wanted to make a statement. R259:8, 14, 19. Mr. Bucher told Detective Parks that “identity wasn’t an issue, that the case had self-defense aspects of it that he wanted to get out, and [defendant] wanted to make a statement, and they were going to claim a defense of imperfect self-defense . . .” R259:19. Mr. Bucher also explained that he hoped to establish a good relationship with the prosecutor to facilitate settling the case. R259:19.

Mr. Bucher and Detective Parks met in the jail parking lot. R259:10. Mr. Bucher told the detective not to ask any questions about the gun. *Id.* Mr. Bucher explained that the gun had been destroyed and that it could not be used in any more crimes. *Id.* Mr. Bucher knew that defendant did not want to talk about the gun because it might implicate him or his family members in an additional crime. R259:29.

Defendant was “uncomfortable” giving a statement to police, although Mr. Bucher had previously discussed it with him. R259:24-25. Mr. Bucher asked the detective to leave while he talked to defendant. R259:26. Mr. Bucher and defendant then had a “lengthy conversation concerning the nature of this case and the way that [Mr. Bucher] thought it had to be done.” *Id.* Mr. Bucher explained that he had come “to the conclusion early on that [defendant] was in true fear of this Maestas, that he didn’t go hunting Maestas; that the aggressor, it was always the indications it was the victim.” R259:27. Mr. Bucher “felt that [defendant] was telling [him] the truth,” and “was a credible witness.” *Id.* “And there were other credible facts to backup his story, so [Mr. Bucher] thought that was the way to approach this case because [defendant] was credible.” *Id.*

Defendant questioned Mr. Bucher's approach and at one point asked whether they could "question [defendant's] identity and still do a self-defense or modified self-defense." R259:27. Mr. Bucher explained that the two defenses were "inconsistent" and that "[w]hen you get a jury to give us the time of day, if we're going to modify that it was self-defense, we got to be completely truthful." *Id.*

When asked if he had to talk defendant into making the statement, Mr. Bucher replied, "It was close, it was close. He did not – he didn't see my point of view on the thing, but I took that as his lack of experience in this kind of thing," because defendant had "never been involved in anything like this." *Id.*

After talking with defendant, Mr. Bucher invited Detective Parks back in. R259:12. Mr. Bucher advised defendant of his constitutional right to remain silent and told the detective that defendant wished to waive that right. R259:15-16. Detective Parks did not read defendant's *Miranda* rights to him because his "attorney was present and represented him on that matter." R259:13. Defendant then gave his statement. *See id.*

Defendant testified that he initially refused to give a statement to police, but that Mr. Bucher "kept insisting" that he do so. R259:33. Defendant said that Mr. Bucher told him that police "had a substantial amount of evidence against him" and that a statement would be the only way to obtain any "benefits." R259:33-34. Defendant acknowledged that he knew that Anthony Ferguson could identify him both from "paperwork" that he had received when he was booked into jail and from his own personal experience: "That's the one that I knew for a fact, that I was a hundred percent sure in my mind, then I believe that Mr.

Bucher told me that there other witnesses.” R259:36. Although defendant could not recall whether Mr. Bucher “specially” told him that there were other witnesses who could identify him, he knew there were “a bunch of other people around at [the] time.” R259:36-37. Defendant finally stated that while he did not “want to talk about the whole situation,” Mr. Bucher “persuaded” him to do so. R259:37.

Based on all the testimony, the trial court found that defendant’s statement to Detective Parks was “made as part of the cogent and joint strategy of [defendant] and his attorney to argue that Maestas had been killed in self-defense, or that at most, [defendant] was guilty of manslaughter, arising from an imperfect use of deadly force in circumstances not amounting to reasonable self-defense.” R117. The trial court also found that before defendant gave his statement, defendant’s “*Miranda* warnings were waived by Mr. Bucher, and he remained present with his client for the duration and totality of the interview by Detective Parks.” R117. The trial court concluded that defendant had not shown that Mr. Bucher’s performance was either deficient or prejudicial, particularly where “there was a tactical and rational basis for his actions in advising [defendant].” R119.

B. The *Strickland* standard.

To prevail on an ineffectiveness claim, defendant must “show that counsel’s performance was deficient” and that “the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either prong defeats the defendant’s claim. *See id.*

1. Deficient performance prong.

To satisfy the first *Strickland* prong, defendant “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. As the *Strickland* court recognized, “[t]here are countless ways to provide effective assistance in any given case.” *Id.* at 689. Indeed, “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.*

Strickland also recognized that “[i]t is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence” and “all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.* at 689. Thus, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.” *Id.* This means that counsel’s performance must be judged based on his or her “perspective at the time.” *Id.*

It is precisely because of the “distorting effects of hindsight,” that this Court has said that it “will not second-guess trial counsel’s legitimate strategic choices, however flawed those choices might appear in retrospect.” *State v. Tennyson*, 850 P.2d 461, 465 (Utah App. 1993). Rather, a defendant must “overcome the strong presumption that counsel’s performance fell ‘within the wide range of reasonable professional assistance’ and that ‘under the circumstances, the challenged action “might be considered sound trial strategy.”’” *Id.* (quoting *Strickland*, 466 U.S. at 689).

2. Prejudice prong.

The second *Strickland* prong can be met “only by showing there is a reasonable probability that ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Tennyson*, 850 P.2d at 466 (quoting *Strickland*, 466 U.S. at 694). The burden is on the defendant to prove both *Strickland* prongs and to assure that the record on appeal is adequate to support his claim. *See State v. Litherland*, 2000 UT 76, ¶¶ 16-19, 12 P.3d 92.

C. Counsel performed objectively reasonably in advising defendant to talk to police.

1. Counsel had a legitimate strategic reason for his advice.

Defendant’s ineffectiveness claim fails, first, because he has not overcome the “strong presumption” that counsel’s conduct fell “within the wide range of reasonable professional assistance” and that “under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (additional quotation marks and citation omitted).

The primary thrust of defendant’s claim is that his counsel was ineffective for advising him to give a statement to police so soon after he was arrested, without first completing an adequate investigation. *See* Br. Aplt. 13-14, 18-20, 23-25. In support, defendant asserts that “[n]ot one witness called by the State at trial identified [defendant] as being involved in the shooting.” Br. Aplt. 19. Implicit in defendant’s argument is that his counsel might not have recommended making a statement if he had adequately investigated.

“Whether or not to recommend making a statement [to police] is a strategic decision which is only deficient if it is unreasonable ‘from counsel’s perspective at the time’ he made the recommendation.” *Smith v. Rogerson*, 171 F.3d 569, 572-73 (8th Cir. 1999) (quoting *Strickland*, 466 U.S. at 689). *See also Knappenberger v. State*, 672 S.W.2d 54, 56 (Ark. 1984) (in assessing counsel’s advice to give pre-trial statement to police, “what counsel knew at the time he advised [defendant] is pertinent, not what evidence the state eventually decided to present at trial”). The question, then, is whether, Mr. Bucher’s advice to give a statement was reasonable, in view of what Mr. Bucher knew, or should have known, at the time.

At the time Mr. Bucher advised defendant, he knew that defendant had been arrested and charged with murder based on evidence that the police had already gathered. R259:6-8. Mr. Bucher also knew that at least one witness—Anthony Ferguson—could positively identify defendant as the killer. R259:10-12, 22, 29, 36. Ferguson knew defendant. R258:33; R259:18, 36. Although Ferguson claimed that he did not see defendant with a gun, he told police that he saw defendant fighting with the victim at the time of the shooting. R259:12. Ferguson also told police that he drove defendant away from the scene of the murder. R259:12, 17-18, 22. Because Ferguson knew defendant, there was no likelihood that Ferguson could be impeached regarding his identification of defendant.

Defendant downplays this important evidence, emphasizing instead that Ferguson did not testify at trial, and that his counsel did not discover before he gave his statement that no other witness to the shooting could identify him. Br. Aplt. 19-20, 31, 36. Mr. Bucher, however, cannot be faulted for not foreseeing that Ferguson would defy a subpoena.

Moreover, while the other witnesses to the shooting could not directly identify defendant, their testimony, in conjunction with Ferguson's statement, made his identification a foregone conclusion. For example, Melissa Adams saw the shooter immediately get into what turned out to be Ferguson's teal Ford Explorer. R260:109, 119. And defendant's former little league football coach saw defendant near the site of the shooting just moments before it happened. R260:51-53. Thus, at the time Mr. Bucher advised defendant to give a statement, he knew that defendant could be positively identified.

In addition to knowing that defendant could be positively identified, Mr. Bucher also knew, from talking with defendant, that he had a viable self-defense claim. R259:26-27. Mr. Bucher knew that the victim had a history of violence and had threatened defendant. *Id.* He also knew that it was the victim, not defendant, who initiated the confrontation that led to the shooting. *Id.* Finally, Mr. Bucher found defendant and his story to be credible. *Id.*

And, contrary to defendant's claim, Mr. Bucher did investigate before advising him to give a statement. Mr. Bucher testified that before defendant gave the statement, Mr. Bucher talked extensively with defendant, talked with the detective, and reviewed some initial discovery he had received. R259:22, 25, 28. Defendant does not say what other evidence Mr. Bucher could have found after further investigation, other than to suggest that no witness could identify defendant as the shooter. Br. Aplt. 18-20. But, as explained, Ferguson and Adams together provided police with a conclusive identification, and Mr. Bucher knew at least that much when he advised defendant. The fact that no other witness alone could identify defendant as the shooter did not weaken the State's case. Again,

defendant points to no other evidence that Mr. Bucher would have discovered with further investigation that might have affected his advice.⁸

Under the foregoing circumstances, it was not unreasonable for Mr. Bucher to believe that defendant's best strategy was to advance a self-defense claim. As Mr. Bucher explained, he wanted to present defendant's self-defense claim "early on" because he "hoped to either try the thing under the idea that [defendant] was acting in self-defense," or he hoped for a plea bargain for something less than murder. R259:25.

Defendant scoffs at Mr. Bucher's first proffered reason, contending that a defendant is "not required to announce his trial strategy beforehand" and that "[l]ittle tactical advantage lies in detailing the defense theory before discovery, months before trial." Br. Aplt. 24. While defendant is correct that he need not reveal his trial strategy beforehand, he is wrong that there is "little tactical advantage" in promptly detailing a viable self-defense claim.

The "tactical advantage" of an early statement was that defendant could (and did) testify at trial in line with his statement, thereby showing the jury that he had nothing to hide and that he had been consistently cooperative, honest, and forthright. *See, e.g., Knappenberger*, 672 S.W.2d at 56 (counsel's strategy to have defendant make pre-trial

⁸Throughout his argument, defendant asserts that Mr. Bucher's advice was based entirely on the detective's "misstatements about the existence of witnesses who could identify [defendant]. Br. Aplt. 18-20. First, it is clear from the suppression hearing, the preliminary hearing, and trial, that the detective did not misstate the strength of the State's case. *See* R258:15-21, 30-33; R259:10-12, 17-18; R260:73-95, 107-22. Between Ferguson and Adams, the State could positively identify defendant as the shooter. Another witness—defendant's former little league football coach—also put defendant near the scene at the time of the shooting. Second, it is also clear from the suppression hearing that Mr. Bucher relied on this accurate information in advising his client.

statement of self-defense and testify at trial in line with that statement was reasonable because it showed jury that defendant had consistently been forthright and honest). Such a strategy, therefore, enhances the credibility of the claim for the jury. Indeed, defendant's trial counsel made sure that the jury knew that defendant had nothing to hide and that he had fully cooperated with police by turning himself in the day after the murder and "voluntar[ily]" giving a statement to police a mere "four or five days later." R261:202. *See also* 260:98-99, 104. That the strategy ultimately did not succeed, does make it unreasonable.⁹ *See Strickland*, 466 U.S. at 689-90.

Defendant also disparages Mr. Bucher's secondary plan to use defendant's statement to obtain a favorable plea bargain. Br. Aplt. 24-25. Defendant faults Mr. Bucher for advising him to give a statement without first conducting discovery or "discussing the possibility of leniency" with the prosecution. *Id.* Defendant asserts that Mr. Bucher effectively "handed the prosecution the most incriminating evidence in exchange for nothing." Br. Aplt. 25.

Because Mr. Bucher's first proffered strategy was sound, it does not matter whether his second one was. In any event, advising defendant to make a statement to curry favor with the prosecution was reasonable under these circumstances. Contrary to defendant's claims,

⁹Although not applicable here, another reason for adopting the strategy employed by Mr. Bucher is to make a record of the self-defense claim so that the defendant will not have to testify. *See, e.g., Smith*, 171 F.3d 569 at 573 (where defendant had low intelligence and criminal history, reasonable for counsel "to believe that the best way to get the provocation facts into evidence would be by having [defendant] make a statement to the police instead of testifying at trial.").

Mr. Bucher did investigate before advising him to make a statement. *See* R259:21-30. He also contacted the prosecutor, who told him to arrange the interview directly with Detective Parks. R259:8-9; Defense Ex. 1. In any event, defendant had nothing with which to bargain for leniency before giving his statement. Police had already conclusively identified defendant as the shooter. Defendant had no accomplice that he could turn State's evidence against and nothing in the record suggests that he had other valuable information to offer. It is thus conceivable that Mr. Bucher reasonably hoped that by immediately cooperating and candidly telling his story, defendant might be able to convince the prosecutor that he was not the aggressor and had a viable self-defense claim that could result in an acquittal.

If the prosecutor were so convinced, Mr. Bucher could also reasonably hope for an offer to let defendant plead to manslaughter. But even if the prosecutor offered nothing, defendant had nothing to lose because he had already decided to present a self-defense claim at trial. And, as stated, establishing that claim early on would enhance its credibility. Thus, under these circumstances, Mr. Bucher reasonably advised defendant to give a statement before seeking a plea bargain.¹⁰

¹⁰Mr. Bucher added at the motion to suppress hearing that he also hoped that the statement would result in a reduction of bail for his client. R259:25. Defendant asserts that such a view was "inconceivable" once he admitted his involvement, given that he was unemployed, unmarried, and facing murder charges. Br. Aplt. 25. Again, because Mr. Bucher had other legitimate strategic reasons for his advice, it does not matter whether this one was reasonable. But it should be remembered that this was not Mr. Bucher's primary reason. Also, Mr. Bucher's idea may not have been as unreasonable as defendant suggests, particularly if defendant had convinced the prosecution that he had acted in self-defense.

In sum, Mr. Bucher had a legitimate strategy in advising defendant to give a statement early on, so as to facilitate a credible self-defense claim at trial. That the jury ultimately rejected defendant's self-defense claim does not render that strategy unreasonable. *See Strickland*, 466 U.S. at 689-90. That other attorneys may have chosen a different strategy also does not render Mr. Bucher's performance unreasonable. *Id.* Indeed, given what Mr. Bucher knew at the time he gave his advice, and given the evidence actually presented at trial, it is clear that a self-defense claim was defendant's best chance for an acquittal or leniency.

2. The record does not support defendant's claim that his attorney usurped his right to decide the objectives of representation.

Defendant argues that Mr. Bucher's performance surrounding his statement "usurped" defendant's right "to decide the objectives of representation." Br. Aplt. 14. Specifically, defendant claims that "Mr. Bucher effectively confessed [defendant] to manslaughter, having decided without consulting [defendant] that a claim of 'imperfect self-defense' was [defendant's] only plausible defense." Br. Aplt. 14. Defendant asserts that "[b]y so doing, Mr. Bucher violated the tenet universal to the American justice system that a lawyer 'shall abide by a client's decisions concerning the objectives of representation.'" Br. Aplt. 14 (quoting Utah R. Prof. Conduct 1.2(a)).

Although not clear, defendant's argument appears to be directed at Mr. Bucher's pre-interview statement to Detective Parks that "identity wasn't an issue" and that "the case had self-defense aspects of it that he wanted to come out." *See* Br. Aplt. 14-15. The claim also

appears to generally attack Mr. Bucher's advice to give a statement, because defendant also asserts, "There were no pressing deadlines requiring such hasty action. Mr. Bucher could certainly have consulted with [defendant] before telling the detective that [defendant] was involved, and then insisting that [defendant] give a statement." Br. Aplt. 16.

Whichever statement defendant is attacking, his claim suffers from several mistaken assumptions. First, defendant erroneously asserts that Mr. Bucher unilaterally, without any input from him, decided to assert a self-defense or imperfect self-defense claim. As stated, however, the trial court expressly found that defendant's statement was "made as part of the cogent and *joint* strategy of [defendant] and his attorney to argue that Maestas had been killed in self-defense, or that at most [defendant] was guilty of manslaughter" R117 (emphasis added).

Defendant argues that this finding is "clearly erroneous," but marshals no evidence in support. See Br. Aplt. 41-42. Failure to marshal is reason alone to reject this argument. See Utah R. App. P. 24(a)(9); *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶¶ 23-27, 553 Utah Adv. Rep. 21.

In any event, the suppression hearing evidence amply supports the finding. Mr. Bucher testified that he had several conversations with defendant between October 22 to October 27. R259:28. Mr. Bucher explained that before the interview with Detective Parks, he had talked to defendant "about how to do the case," although he did not think defendant knew "[e]xactly what the statement was and when it was going to place." R259:24-25. Then, before defendant gave a statement, Mr. Bucher talked extensively with him, reviewing "the

evidence against him and possible consequences” and explaining why the best strategy would be a self-defense or imperfect self-defense claim. R259:25, 28. Defendant testified that although he initially did not want to give the statement, Mr. Bucher “persuaded” him to do so. R259:36-37. Defendant cites no authority for the proposition that an attorney should not try to persuade his client to choose the strategy that counsel, in his professional judgment, believes is best.

Second, defendant’s argument erroneously assumes that Mr. Bucher’s pre-interview statement to Detective Parks amounted to “confessing” him to manslaughter. It is not a “confession” for a defendant seen fighting with a homicide victim at the time and place of the homicide to tell police he shot in self-defense. It is, rather, a “justification.” *See* Utah Code Ann. § 76-2-401 (West 2004). Moreover, Mr. Bucher’s statement told Detective Parks nothing new. Thus, neither Mr. Bucher’s pre-interview statements nor defendant’s statement amounted to a “confession.”

Finally, defendant fails to explain why Mr. Bucher’s statement matters, given that defendant himself subsequently detailed his involvement to police. Mr. Bucher’s statement was not admitted at trial. If defendant is claiming that Mr. Bucher’s statement forced him to give his statement, nothing in the record supports that claim. Nor does defendant cite any authority that Mr. Bucher’s statement would have been admissible if defendant had not subsequently given his statement.

In sum, defendant has not shown that Mr. Bucher acted unilaterally or without first consulting him. Indeed, the trial court’s findings and the record show otherwise.

3. The record does not support the claim that Mr. Bucher violated his client's confidences.

In a related argument, defendant asserts that Mr. Bucher's pre-interview statement violated his attorney-client privilege. Br. Aplt. 16-17. Again, defendant's argument rests on a mistaken assumption. First, defendant assumes that Mr. Bucher was unauthorized to make the statement. As explained, however, the trial court expressly found that defendant's statement was part of a joint strategy to set forth a self-defense claim. And, according to the record, Mr. Bucher communicated with defendant several times before the interview. Nothing in the record suggests that Mr. Bucher did not have authority to make this statement.

Second, Mr. Bucher's general statement, that "identity wasn't an issue" and that defendant acted in self-defense was a realistic assessment of the evidence, not a breach of confidence. Both Mr. Bucher and Detective Parks already knew from sources other than defendant that identity was not an issue.

Finally, defendant's detailed statement cured any harm that could have possibly flowed from a breach of confidence. While defendant speculates that Mr. Bucher could have been called as a prosecution witness, he cites no authority for that proposition. In any event, Mr. Bucher was not called as a witness and his statement was not used against defendant.

4. The record does not support defendant's claim that Mr. Bucher did not ensure a valid waiver of his *Miranda* rights.

Defendant finally claims that Mr. Bucher performed deficiently because he did not ensure that defendant validly waived his *Miranda* rights before giving his statement. Defendant essentially claims that Mr. Bucher should have insisted that Detective Parks read

his *Miranda* rights to him and that Mr. Bucher's "purported waiver of [defendant]'s right to remain silent" was invalid. Br. Aplt. 20-23. This claim hinges on whether defendant's *Miranda* rights were violated. As explained below in Point II, however, *Miranda* rights need not be administered where counsel is present throughout the statement and where defendant had an opportunity to consult with counsel before giving the statement. Mr. Bucher, therefore, could not have performed deficiently in this regard.

D. Defendant has not shown that counsel's advice to talk to police prejudiced him.

Because Mr. Bucher had a legitimate strategic reason for advising defendant to give a statement, this Court need not reach the prejudice prong. But if it does, defendant has not shown prejudice.

1. Because defendant has not shown an actual conflict of interest or constructive denial of counsel, prejudice may not be presumed.

In Point II of his brief, defendant asserts that prejudice may be presumed because Mr. Bucher had "an actual conflict of interest," or because defendant was "constructively denied assistance of counsel." Br. Aplt. 25-26. Defendant has shown neither.

Conflict of interest. As defendant correctly points out, the Sixth Amendment right to the effective assistance of counsel includes the right to conflict-free counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). To show this right was violated, defendant must establish both that his counsel had an actual conflict and that the conflict adversely affected his counsel's performance. *Id.* at 348. See also *United States v. Alvarez*, 137 F.3d 1249, 1252 (10th Cir. 1998); *State v. Lovell*, 1999 UT 40, ¶ 22, 984 P.3d 382; *State v. Johnson*, 823

P.2d 484, 488 (Utah App. 1991). An actual conflict of interest exists “if counsel was forced to make choices advancing other interests to the detriment of his client.” *Alvarez*, 137 F.3d at 1252. *See also Lovell*, 1999 UT 40, ¶ 22. “To demonstrate an actual conflict of interest, the [defendant] must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party.” *Alvarez*, 137 F.3d at 1252 (quoting *Danner v. United States*, 820 F.2d 1166, 1169 (11th Cir. 1987)). “If the defendant makes such a showing, prejudice need not be demonstrated to prevail on the claim.” *Johnson*, 823 P.2d at 488 (citing *Cuyler*). Rather, prejudice will be presumed. *Id.*; *Cuyler*, 446 U.S. at 345-50.

Defendant cites no specific instance where Mr. Bucher “was forced to make choices advancing other interests to the detriment of his client.” *Alvarez*, 137 F.3d at 1252. Defendant’s conflict of interest claim stems solely from his belief that counsel performed objectively unreasonably in advising him to give a statement to police so early in the proceedings. While defendant suggests that Mr. Bucher abandoned his duty of loyalty to him by advising him to give a statement, *see Br. Aplt. 27-29*, the record does not support that claim. As stated, Mr. Bucher talked extensively with defendant before he gave his statement and Mr. Bucher conducted preliminary discovery and investigation. More important, Mr. Bucher explained why he believed that self-defense was defendant’s best claim. This was not a case, as defendant suggests, where counsel colluded with the prosecution to the detriment of his client.

In sum, defendant identifies no interest that was advanced over his own. Rather, he merely complains that Mr. Bucher advised him to give a statement before he had adequately investigated and without getting something “of value” in return. Br. Aplt. 30-31. In other words, defendant merely claims that his counsel made negligent choices. A negligent choice, without more, does not establish an actual conflict of interest for purposes of presuming prejudice.¹¹

Constructive denial of counsel. Defendant correctly states that he also need not prove prejudice where he has shown a “complete denial of counsel.” Br. Aplt. 30. *See United States v. Cronin*, 466 U.S. 648, 659 (1984). But defendant has not shown that he was completely denied counsel.

A “complete denial of counsel” occurs where “counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding,” or where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronin*, 466 U.S. at 659 & n.25. It is the last category that defendant insists applies here. Br. Aplt. 30-32.

Defendant has not shown that Mr. Bucher “entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing,” or that his advice led to that result. Mr. Bucher was faced with two potential defenses: forcing the State to identify defendant or

¹¹Defendant’s conflict of interest claim continues to rely on the erroneous allegation that Mr. Bucher performed no investigation, did not consult with defendant, and had no legitimate basis for his advice. Br. Aplt. 30-32. As explained, Mr. Bucher conducted an adequate investigation, consulted with defendant, and had a reasonable strategy for advising defendant to give a statement to police.

forcing the State to prove that defendant did not act in self-defense. Mr. Bucher knew that the State had witnesses who could conclusively identify defendant. Thus, under the circumstances, it was reasonable for Mr. Bucher to advise self-defense. The reasonableness of his advice is supported by the information that his client had given him and the evidence of self-defense ultimately presented at trial.

In short, this was not a case in which Mr. Bucher encouraged his client to cooperate with no benefit. By having his client make the statement when he did, Mr. Bucher laid the foundation for defendant to present a credible self-defense claim at trial. Setting up a defense that could result in an acquittal or reduced charge is hardly an “entire[] fail[ure] to subject the prosecution’s case to meaningful adversarial testing.”¹² *Cronic*, 466 U.S. at 659.

2. Defendant has not shown that “but for” counsel’s advice, there was a reasonable probability of a better outcome for him.

Defendant argues that he was prejudiced by Mr. Bucher’s advice because the prosecution used his statement at trial against him, both to prove guilt and to undermine his

¹²Defendant asserts that this Court may presume prejudice irrespective of whether there was a conflict of interest or denial of counsel as long as he can show that he received an unfair trial. Br. Aplt. 32-33. This argument is directly contrary to *Strickland*. Defendant essentially argues that his trial was unfair because his trial attorney was locked into a self-defense claim once the motion to suppress was denied and that the prosecution used his statement to prove guilt and to undermine the self-defense claim. That claim is nothing more than a claim that Mr. Bucher performed deficiently. *Strickland* held that aside from constructive denial of counsel or a conflict of interest, “actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.” *Strickland*, 466 U.S. at 692. Defendant, therefore, must prove prejudice.

self-defense claim.¹³ See Br. Aplt. 37. Defendant's argument, however, does not show the prejudice that *Strickland* requires.

As explained, the prejudice standard under *Strickland* can be met "only by showing there is a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would be different.'" *State v. Tennyson*, 850 P.2d 461, 465 (Utah App. 1993) (quoting *Strickland*, 466 U.S. at 694) (emphasis added). In other words, defendant must demonstrate that if counsel had not made the alleged error, there is a reasonable probability that he would have been acquitted or convicted of the lesser offense of manslaughter. Defendant has not shown, nor can he, that this is the case.

To show prejudice here, defendant must first show that if he had not given the statement, as advised by Mr. Bucher, his trial counsel would not have run the self-defense claim at trial, but would have instead run a claim that he was not the person—or at least could not be identified as the person—who shot Maestas. If trial counsel would have claimed self-defense anyway, defendant could not have been prejudiced by Mr. Bucher's advice. Defendant must also show, however, that if his counsel had presented an identity defense, there was a reasonable likelihood that it would have resulted in an acquittal. Defendant has not made either showing.

¹³Defendant also argues that Mr. Bucher's inadequate investigation before advising him prejudiced him. Br. Aplt. 38-39. This argument, however, ultimately goes to whether Mr. Bucher's advice to make a statement was prejudicial. Presumably, under defendant's argument, if Mr. Bucher had adequately investigated, he would not have advised him to make a statement. Thus, the appropriate inquiry is whether Mr. Bucher's advice to give a statement was prejudicial under *Strickland*.

First, defendant has not shown that but for his statement, his trial counsel would not have presented a self-defense claim. While it is true that trial counsel moved to suppress the statement, that alone does not prove that he ultimately would have chosen an identity defense over self-defense. The record in this case, including the strong self-defense case actually presented at trial, suggests that trial counsel likely would have stuck with self-defense. This was not a case in which defendant had a believable identity defense. The State had eyewitnesses, including Anthony Ferguson, Melissa Adams, and defendant's little league football coach, who could conclusively place defendant in a fight with the victim at the time of the shooting. Moreover, as defendant proved at trial, he and the victim were involved in a long-standing feud. The State could have used this evidence to prove identity by showing that defendant had a motive to kill Maestas. And, as defendant points out, he told his mother and girlfriend immediately after the shooting what had happened. Br. Aplt. 36, n.4; R260:141-42, 161. While defendant claims this evidence would not have come in but for his statement, it is more than likely that police would have discovered these statements if defendant had insisted on putting the State to its proof of identity.

In short, with or without defendant's statement to police, trial counsel was faced with the stark reality that defendant had shot and killed Maestas. Defendant admitted this to his mother, his girlfriend, the police, the jury, and the sentencing court. Trial counsel, like Mr. Bucher, was also faced with the reality that there were witnesses who could place defendant at the scene. But trial counsel also knew that defendant had a history with Maestas that gave

him a credible self-defense claim. Under these circumstances, it is unlikely that an experienced criminal attorney would choose identity over self-defense.

But even if trial counsel would have chosen identity, defendant has not shown that that defense was more likely to result in a better outcome than the self-defense claim he ran. Defendant's argument to the contrary relies on the fact that the witnesses to the shooting could not identify him at trial and that Ferguson did not appear at trial, although subpoenaed. Br. Aplt. 36. Defendant ignores, however, that if the prosecution had known that it was required to prove an identity defense, it would have made certain that Ferguson appeared. The prosecution certainly could have obtained a short continuance while it compelled Ferguson's appearance. And, if defendant had not made his self-defense statement to police, it is likely that police would have continued to develop leads bolstering their case.

In sum, defendant has not shown that Mr. Bucher's advice prejudiced him.¹⁴

¹⁴Defendant asserts that "even [though] trial counsel [ultimately] pursued a self-defense claim at trial, absent the detective's testimony from [defendant's] statement, there still exists a reasonable probability that the self-defense or manslaughter strategies would have succeeded." Br. Aplt. 39. He does not explain, however, why this would be so. Defendant's trial testimony was largely consistent with his statement to police. Defendant was not significantly impeached regarding any inconsistencies. While defendant complains that the prosecution expressed disbelief during closing arguments at his claim of self-defense, that incredulity was based almost entirely on defendant's story at trial, not on any significant inconsistencies between his statement and trial testimony. See R261:250-56.

POINT II

MIRANDA WARNINGS ARE NOT REQUIRED WHERE DEFENSE COUNSEL INITIATED THE INTERVIEW WITH POLICE, DEFENDANT HAD AN OPPORTUNITY TO CONSULT WITH COUNSEL, AND COUNSEL WAS PRESENT THROUGHOUT THE INTERVIEW

Defendant contends that the trial court should have suppressed his statement to police because he did not voluntarily, knowingly, or intelligently waive his *Miranda* rights. Br. Aplt. 40-48. Defendant argues that the detective was required to read all four *Miranda* warnings to him and that the “mere presence of defense counsel [did] not cure” that failure. *Id.* at 40, 44-48. Defendant acknowledges that Mr. Bucher advised him “of his right to remain silent,” but claims that nothing in the record shows that defendant was advised that anything he said could be used against him. *Id.* at 44, 47. This, according to defendant, resulted in only partial compliance with *Miranda*. *See id.* at 44-45. Defendant also argues that Mr. Bucher could not waive his right to remain silent for him. *Id.* at 44-48. Defendant finally asserts that the “failure to secure a valid waiver of *Miranda* rights” from him was not “harmless beyond a reasonable doubt.” *Id.* at 49.

As explained below, the presence of counsel obviates the need for *Miranda* warnings. Even assuming a *Miranda* violation, it was harmless beyond a reasonable doubt, because the police did not need defendant’s statement to prove that he shot Maestas and because defendant used his statement to advance his self-defense claim at trial. Consequently, the trial court properly denied defendant’s motion to suppress his statements.

A. *Miranda* warnings are unnecessary when counsel is present during the interview.

The United States Supreme Court declared in *Miranda* that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant *unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.*” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). The Supreme Court held that “unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it,” police are required, before questioning, to warn the suspect “that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Id.* at 444.

In adopting these procedural safeguards, the *Miranda* court sought to ameliorate the coercive effects of custodial interrogation. *Id.* at 445. In particular, the Supreme Court emphasized the coercive nature of isolating the suspect during interrogation. *See id.* at 445-58, 461. For example, the *Miranda* court noted that in each of the four cases before it, “the defendant was questioned by police officers, detectives, or a prosecuting attorney *in a room in which he was cut off from the outside world.*” *Id.* at 445 (emphasis added). Thus, all four cases “share[d] salient features – *incommunicado interrogation* of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.” *Id.* (emphasis added). The Court then cited extensively to police manuals instructing interrogators that ““the principal psychological factor contributing to a

successful interrogation is privacy – being alone with the person under interrogation.” *Id.* at 449 (citation omitted).

It was the concern with the coercive effects of isolation that led the Supreme Court to observe that counsel’s presence during the interrogation would, by itself, provide a sufficient alternative procedural safeguard to secure the privilege against self-incrimination:

The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that the statements made in the government-established atmosphere are not the product of compulsion.

Miranda, 384 U.S. at 466 (emphasis added). In other words, “the presence of counsel dispels that compelling atmosphere of custodial interrogation to the point of obviating the need for the familiar *Miranda* warnings.” *People v. Watts*, 2006 WL 2271304, at *4 (Mich. App. August 8, 2006) (unpublished decision) (attached in **Addendum C**). *See also Smith v. State*, 832 So.2d 92, 98 (Ala. Crim. App. 2001) (*Miranda* court’s “concerns about ‘incommunicado interrogation of individuals in a police-dominated atmosphere’” not implicated where counsel present).

Neither this Court nor the Utah Supreme Court has addressed whether the presence of counsel obviates the need for *Miranda* warnings. Several federal and other state courts, however, have relied on the foregoing language in *Miranda* to hold that counsel’s presence during the interrogation makes *Miranda* warnings unnecessary. *See, e.g., United States v. Facone*, 544 F.2d 607, 610-11 (2d Cir. 1976) (rejecting “as frivolous,” the claim that FBI agent could not testify regarding defendant’s statement, made in his attorney’s presence,

without first informing defendant and his counsel that the statement could be used at trial); *Frohmann v. United States*, 380 F.2d 832, 836 (8th Cir. 1967) (defendant could not show *Miranda* violation where counsel was present when he made statement); *United States v. Thevis*, 469 F. Supp. 490, 507-08 (D. Conn. 1979) (statement made in presence of defendant's two attorneys admissible even though no *Miranda* warnings given); *United States v. Guariglia*, 757 F. Supp. 259, 264 (S.D.N.Y. 1991) (*Miranda* warnings unnecessary when counsel is present); *Smith v. State*, 832 So.2d 92, 98 (Ala. Crim. App. 2001) (state need not show defendant advised of *Miranda* rights because counsel present during interrogation and defendant had opportunity to consult with counsel before interrogation); *People v. Mounts*, 784 P.2d 792, 795-96 (Colo. 1990) (*Miranda* warnings rendered superfluous where "defendant and his chosen defense counsel are given adequate time for consultation prior to any police interrogation, and counsel is actually present at the police interview"); *Collins v. State*, 420 A.2d 170, 176-77 (Del. 1980) (*Miranda* warnings "rendered unnecessary and superfluous where counsel for defendant is present and defendant has been given an adequate opportunity to consult with counsel prior to the giving of any statement"); *Baxter v. State*, 331 S.E.2d 561, 568 (Ga. 1985) (*Miranda* warnings unnecessary because counsel's presence during interrogation provided adequate protective device), *overruled on other grounds by Height v. State*, 604 S.E.2d 796 (Ga. 2004); *State v. Randall*, 557 P.2d 1386, 1390-91 (Or. Ct. App. 1976) (*Miranda* warnings unnecessary before parole revocation hearing where counsel was present); *State v. McKinney*, 603 S.W.2d 755, 760 (Tenn. Crim. App. 1980) (noting "*Miranda* case itself holds that the presence of the defendant's attorney obliterates

the necessity for a police officer to advise one in custody of his rights as mandated by *Miranda*"); *State v. Alexandre*, 2003 WL 21387159, at *3 (Me. Super. May 11, 2003) (unpublished decision) (police did not need to advise defendant of his *Miranda* rights because counsel was actually present) (attached in **Addendum C**); *People v. Watts*, 2006 WL 2271304, at *4 (Mich. App. August 8, 2006) (unpublished decision) (noting that "*Miranda* Court recognized that the presence of counsel dispels the compelling atmosphere of custodial interrogation to the point of obviating the need for the familiar *Miranda* warnings") (attached as **Addendum C**). See also Wayne R. LaFave, Jerold H. Israel, Nancy J. King, *Criminal Procedure*, § 6.8(a), at p. 573 (2d ed. 1999) ("It is generally accepted that if the attorney was actually present during the interrogation, then this obviates the need for the [*Miranda*] warnings.").

Defendant cites only two cases to the contrary: *State v. DeWeese*, 582 S.E.2d 786, 795 (W.Va. 2003), and *State v. Joseph*, 128 P.3d 795, 810-11 (Haw.), *reh'g denied* 128 P.3d 891 (Haw. 2006). Br. Aplt. 46-48. Those cases are inapposite, but to the extent they are not, they are against *Miranda* and the clear weight of the authority cited above.

The issue in *DeWeese* was whether the defendant's statements during a polygraph test were admissible in the absence of *Miranda* warnings. *DeWeese*, 582 S.E.2d at 794. The police had not administered *Miranda* warnings before the test because DeWeese's attorney, who was in the building before and during the test, told police that the warnings were unnecessary. *Id.* at 795-96. DeWeese's attorney, however, was not permitted in the room while the polygraph was administered. *Id.* at 795 n.17.

The State in *DeWeese* argued that the “failure to provide *Miranda* warnings was not fatal because Mr. DeWeese’s counsel was present in the building when the tests were administered, defense counsel expressly waived the right to have *Miranda* warnings given, and *Miranda* warnings had previously been given to Mr. DeWeese by the police.” *Id.* at 795. The West Virginia Supreme Court rejected that argument, stating that “[u]nder *Miranda*, the mere presence of defense counsel at an interrogation does not negate the necessity for providing the warning against self-incrimination.” *Id.* The *DeWeese* court further stated that it had “found no decision wherein a court has ruled that a defendant forfeits his/her right to be informed of the privilege against self-incrimination merely because he/she has exercised the right to have counsel present at an interrogation.” *Id.*

The *DeWeese* court’s statements were essentially dicta because they were unnecessary to the holding. DeWeese’s attorney was not present during the interrogation, but was elsewhere in the building. In any event, *DeWeese*’s statements are clearly wrong in the face of *Miranda* and the authorities cited above. As explained, *Miranda* expressly states that the “presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege.” *Miranda*, 384 U.S. at 466. *DeWeese* does not even acknowledge this pronouncement. *See DeWeese*, 582 S.E.2d at 795-97. And while the *DeWeese* court was unable to find a single case holding that counsel’s presence obviates the need for *Miranda* warnings, the State has cited to twelve that have. *DeWeese*, therefore, is unpersuasive.

State v. Joseph is equally unpersuasive. In that case, the Hawaii Supreme Court held that *Miranda* warnings must be given even where defendant's counsel set up the interview and was present throughout the interrogation. *Joseph*, 128 P.3d at 809. But the *Joseph* court based its decision entirely on the Hawaii state constitution "and not on the interpretation of the United States Constitution by the United States Supreme Court." *Id.* at 806, 809-11. Moreover, the *Joseph* court relied heavily on the flawed *DeWeese* in reaching its holding. *Id.* at 809-11. Like *DeWeese*, *Joseph* does not acknowledge *Miranda*'s pronouncement that counsel's presence alone is "an adequate protective device." Nor does *Joseph* acknowledge any of the many cases cited above.

In sum, *Miranda* and a overwhelming majority of courts addressing the issue hold that counsel's presence is "an adequate protective device" that obviates the need for *Miranda* warnings. Here, defendant's counsel initiated the interview with police, consulted extensively with defendant before the interview, and was present throughout the interview. The trial court, therefore, properly denied defendant's motion to suppress.¹⁵

B. Even assuming a *Miranda* violation, it was harmless beyond a reasonable doubt.

Even if there were a *Miranda* violation, it was harmless beyond a reasonable doubt because defendant used the statement to his benefit at trial and because the State did not need

¹⁵The warnings given in this case were adequate, in any event. Because defendant exercised his right to counsel by having counsel present, he did not need to be warned of that right. Counsel advised defendant of the right to remain silent immediately before the interview began and stated, in defendant's presence, that defendant wished to waive that right.. See 259:15-16. Defendant could have corrected that statement, but did not.

it to prove defendant shot and killed Maestas. *See State v. Velarde*, 734 P.2d 440, 444 (Utah 1986) (harmlessness of *Miranda* violation must be shown beyond a reasonable doubt).

Defendant asserts that any *Miranda* violation was harmful beyond a reasonable doubt because it proved his guilt, locked him into a self-defense claim, and “deprived him of the right to confront adverse witnesses with their inability to link him to the scene.” Br. Appt. 49. This argument presupposes that but for a *Miranda* violation and his statement, he would not have presented a self-defense claim, but would have instead challenged the reliability of the eyewitnesses. But, as explained above, it is unlikely under all the circumstances of this case that his counsel would not have run a self-defense claim. Consequently, admission of his prior statement was harmless beyond a reasonable doubt. Indeed, trial counsel used defendant’s prior statement to show consistency in his story and that defendant had always been cooperative and honest with police. *See, e.g.*, R260:98-104; R260:130-31; R261:202. As a result, defendant’s self-defense claim was bolstered by his prior statement.


But even assuming, for the sake of argument, that trial counsel would have run the identity defense instead, the absence of his prior statement would not have altered the outcome. The State had witnesses who could positively identify defendant as the shooter, even before he made his statement. Thus, the State did not need defendant’s statement to prove that he shot and killed Maestas. Any violation of *Miranda*, therefore, was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, the State respectfully requests the Court to affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 25th day of August, 2006.

MARK L. SHURTLEFF
ATTORNEY GENERAL

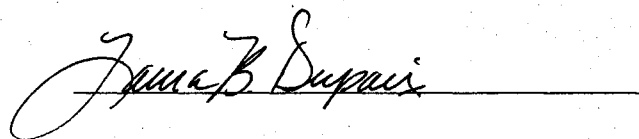


LAURA B. DUPAIX
ASSISTANT ATTORNEY GENERAL

MAILING CERTIFICATE

I hereby certify that on this 25th day of August, 2006, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

John Pace
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "James B. Dupuis", is written over a horizontal line.

ADDENDUM A

Constitutional Provisions

U.S. Const., amend. V

U.S. Const., amend. VI

Amendment V. Grand jury indictment for capital crimes; double jeopardy; self-incrimination; due process of law; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ADDENDUM B

Trial Court's Findings of Fact and Conclusions of Law on Defendant's Motion to Suppress

DAVID E. YOCOM
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FILED DISTRICT COURT
Third Judicial District

APR 12 2005

SALT LAKE COUNTY

By Deputy Clerk

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH**

THE STATE OF UTAH, Plaintiff, -VS- ISAIAH VOS, Defendant.	FINDING OF FACTS AND CONCLUSIONS OF LAW (Re: Defendant's Motion to Suppress Statements) Case No. 041906923 Hon. J. Dennis Frederick
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Defendant's Motion to Suppress Statements came before the Court for hearing on March 14, 2005. Defendant Isaiah Vos was present, and was represented by counsel, Stephen R. McCaughey. The State was represented by Deputy Salt Lake County District Attorneys B. Fred Burmester and Clark A. Harms. The Honorable J. Dennis Frederick, District Court Judge, presided. The Court heard testimony, received evidence, heard the arguments of counsel. The Court thereafter took the matter under advisement, and issued its Minute Entry ruling on March 22, 2005.

Based upon the evidence and testimony adduced at the March 14, 2005 evidentiary hearing, and based upon good cause, the Court now makes and enters the following Findings of Fact:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 041906923

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FINDINGS OF FACT

1. On October 21, 2004, Jeffrey Maestas ("Maestas") was shot four times while he was involved in an altercation or confrontation of some sort with another person at approximately 1832 West 700 North, in Salt Lake City, Utah. Maestas eventually died from these injuries.

2. During the investigation following Maestas' death, suspicion quickly turned to Isaiah Bo'Cage Vos ("Vos") as a possible suspect in the shooting death of Maestas. Within a few hours, Salt Lake City Police Department officers began looking for Vos, and letting it be known among Vos' associates that he was being sought for questioning in Maestas' death.

3. On October 22, 2004, Detective Cordon Parks of the Salt Lake City Police Department Homicide Squad received a telephone call from John Bucher who identified himself as Isaiah Vos' lawyer, and sought to arrange the surrender of Vos to the police.

4. Late in the evening of October 22, 2004, Vos surrendered to police at the law offices of John Bucher. By that time, police had developed probable cause to arrest Vos for the shooting death of Maestas. Vos was booked into the Salt Lake County Adult Detention Center at 7:40 p.m. that evening.

5. At the time of his arrest on October 22, 2004, Vos was given his Miranda warnings, and invoked his right to an attorney. No questioning of Vos was thereafter attempted by police officers.

6. Following Vos' arrest, John Bucher subsequently arranged for Vos to make a statement to the police. Bucher testified that it was his intent was to establish what he perceived as his client's best defense, based on the evidence available to him at the time, of self-defense or imperfect self-defense. Bucher further testified that his strategy was then to seek a favorable plea bargain from the State by urging his client's cooperation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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7. On October 26, 2004, Vos was interviewed while in custody at the Salt Lake County Adult Detention Center. In addition to Vos and Detective Parks, Vos' attorney, John Bucher, was present. Vos' interview was tape recorded by Detective Parks.

8. As the interview commenced, *Miranda* warnings were waived by Mr. Bucher, and he remained present with his client for the duration and totality of the interview by Detective Parks.

9. Vos was advised by his attorney, John Boucher, that he ought to waive his right to remain silent and give a statement to Detective Parks.

10. Vos' October 26, 2004 statements to Detective Parks were made knowingly, voluntarily, and upon the advice of his attorney.

11. Vos' October 26, 2004 statements to Detective Parks were made as part of the cogent and joint strategy of Vos and his attorney to argue that Maestas had been killed in self-defense, or that at most, Vos was guilty of manslaughter, arising from an imperfect use of deadly force in circumstances not amounting to reasonable self-defense.

12. The presence of Vos' attorney during the October 26, 2004 interview with Detective Parks was an adequate protective device, and made the process of police interrogation conform to the dictates of Vos' constitutional privileges.

13. The presence of Vos' attorney during the October 26, 2004 interview with Detective Parks insured that Vos' statements were not the product of compulsion.

14. On October 26, 2004, Vos' counsel at the time, John Bucher, arranged for he and Vos to meet with Detective Parks at the Salt Lake County Adult Detention Center. Mr. Bucher specifically insured that Vos' *Miranda* rights were waived, and gave Vos the opportunity to change his mind about discussing the case with Detective Parks.

15. At the beginning of the interview, Mr. Bucher explained his strategy for the case, relating to advantages of "telling the whole story" given that it is a "gang case", and the defense

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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put forth by both Vos and his attorney was self-defense, or at worst, imperfect self-defense manslaughter.

16. Mr. Bucher also told Vos, in the presence of Detective Parks, that his usual advice to criminal defendants is to "not talk to anybody about anything" but that the circumstances of this case are different.

17. Mr. Bucher asked Vos to waive his right to remain silent and talk to Detective Parks.

18. Mr. Bucher spoke with Vos alone, before the interview recommenced, after which Vos agreed to proceed with the interview.

19. The strategy of both Vos and Mr. Bucher in speaking with Detective Parks was to try and convince Detective Parks, and through him the prosecution, that either Vos actions in shooting Maestas were justified, or at worst, imperfect self-defense manslaughter.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. In the instant case it is clear that no *Miranda* violation nor coercion occurred, because Vos' counsel was present when Vos voluntarily waived his *Miranda* rights and then made statements to Detective Parks. Vos' attorney initiated contact with Detective Parks, both to arrange for Vos to turn himself in to the police, and later to meet with Detective Parks at the jail to discuss this case.

2. Although Vos' statement was made while in custody, it was clearly made knowingly, voluntarily, and in the presence of counsel.

3. Vos has not presented any argument to show that his prior counsel's (Mr. Bucher's) performance was objectively deficient.

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4. Utah courts place the burden of proving an ineffective assistance of counsel claim on the defendant, requiring him to prove there was a "lack of any conceivable tactical basis for counsel's actions." *State v. Mechem*, 2000 UT 247, ¶22, 9 P.3d 777 (quoting *State v. Garrett*, 849 P.2d 578, 579 (Utah Ct.App. 1993)).

5. Further, the Utah court of appeals has based its view on the U.S. Supreme Court's view in *Strickland*, holding that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

6. It is clear that Mr. Bucher's performance in this case shows that there was a tactical and rational basis for his actions in advising Vos.

7. Further, Vos has not presented any argument to try to overcome the strong presumption in favor of defense counsel's conduct falling within the "wide range of reasonable professional assistance.."

8. Therefore, Vos' motion to suppress his October 26, 2004 statements should be denied.

DATED this 12th day of April, 2005

BY THE COURT:

HONORABLE J. DENNIS FREDERICK
DISTRICT COURT JUDGE



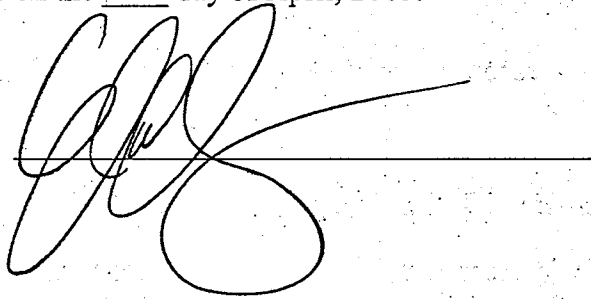
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing **FINDING OF FACTS AND CONCLUSIONS OF LAW (Re: Defendant's Motion to Suppress Statements)** was delivered to STEPHEN R. MCCAUGHEY, Attorney for the Defendant, at 10 West Broadway, Ste. 650, Salt Lake City, Utah 84101 on the 12th day of April, 2005.

A handwritten signature in black ink, appearing to be "S. McCaughey", is written over a horizontal line.

ADDENDUM C

Unpublished decisions

***People v. Watts*, 2006 WL 2271304 (Mich. App. Aug. 8, 2006)**

***State v. Alexandre*, 2003 WL 21387159**

Not Reported in N.W.2d, 2006 WL 2271304 (Mich.App.)
(Cite as: Not Reported in N.W.2d)

Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Coral Eugene WATTS, Defendant-Appellant.
Docket No. 259903.

Aug. 8, 2006.

Oakland Circuit Court; LC No. 04-196617-FC.

Before: KELLY, P.J., and MARKEY and METER,
JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendant appeals by right his conviction of first-degree premeditated murder in the December 1, 1979 death of Helen Dutcher. MCL 750.316(1)(a). The prosecution presented the testimony of one eyewitness, Joseph Foy, who identified defendant as the person who killed Dutcher by stabbing her multiple times. The trial court also ruled the prosecution could present evidence under MRE 404(b) that defendant attacked 17 other women as evidence of defendant's motive (animus toward women), intent (premeditation and deliberation), and scheme, plan, or system in committing murder. We affirm.

I. Factual and Procedural Background

The other acts evidence consisted of defendant's admitting to 12 murders of young women in the state of Texas between September 1991 and May 1982, and one murder of a woman on October 31, 1979 in Wayne County, Michigan. In addition, the prosecution presented evidence through the

testimony of three survivors and defendant's admissions to Texas police officers that defendant attempted during 1982 to murder four other young women in Texas. The last attempted murder occurred on May 23, 1982 in Harris County, Texas. Defendant was arrested as a result of that attack, and on August 10, 1982, pleaded guilty to burglary of a habitation pursuant to a plea bargain with Harris County prosecutors that included a sentence recommendation of sixty years.^{FN1} The prosecution also promised immunity from prosecution in return for defendant confessing to the Texas murders. Harris County assistant district attorney Ira Jones and one of defendant's attorneys, Zinetta Burney, stated the terms of the immunity agreement during the August 10, 1982 Texas plea proceeding:

FN1. Defendant was sentenced to 60 years imprisonment but appeals and subsequent changes in Texas law advanced his release date from his Texas sentence to May 6, 2006.

MR JONES: Your Honor, the plea bargaining between the Defendant and the State is that the State has agreed to recommend 60 years in the Texas Department of Corrections for offense which the Defendant has plead to and in exchange for that the Defendant has agreed he will lead the State of Texas, being the Houston homicide detectives, to all of the graves of individuals that he knows of here in Houston, Texas. He will also assist the Houston Police in their investigation in resolution of a number of unsolved murders in Houston. Likewise, he has agreed he will lead the police to graves and assist in clearing the offenses in the cities of Austin, Galveston, Texas and the cities of Ann Arbor, Michigan; Kalamazoo, Michigan; Detroit, Michigan, and Windsor, Ontario, Canada.

MS. BURNEY: One other thing further I think

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should be in the record that as a result of his assistance, if any of the bodies are turned up or further charges, there will be no prosecution.

MR. JONES: It is our agreement, with the Defense, the Defendant will not be prosecuted as to the results or his divulging location of his bodies or cooperation with the police authorities in those named cities so long as the named cities bind themselves in writing to nonprosecution and it is agreed between us he will not be prosecuted in Houston or Harris County for his information in the discovery of these bodies or the resolution of these murders and will not be so long as these other governmental entities bind themselves in writing to nonprosecution, otherwise, the Defendant will not cooperate with them prior to their binding themselves. [Plea Tr, August 10, 1982, pp 5-7.]

*2 Beginning the same day as his plea, and over the next few days, defendant confessed to the Texas murders. On August 13, 1982, then Wayne County prosecuting attorney William C. Cahalan wrote to the Harris County district attorney's office and offered immunity to defendant in return for his statement regarding the October 31, 1979 murder in the City of Grosse Pointe Farms, Michigan, of Jeanne Clyne. On August 19, 1982, Detective Earl Field of the Grosse Pointe Farms police department interviewed defendant, who confessed to the Clyne murder.

Before trial, the prosecution brought a motion in limine seeking an order allowing admission of the other acts evidence. MRE 404(b)(2). The motion detailed the proposed other acts evidence, asserted that the use of defendant's admissions was not prohibited by the nonprosecution agreements, and that the other acts were admissible for proper purposes subject to a limiting instruction. Defendant also filed a motion in limine, requesting that in the event the trial court granted the prosecution's motion, the court preclude evidence of the circumstances of defendant's admissions, i.e., that he was granted immunity.

The trial court issued its written opinion and order on October 8, 2004, agreeing with the prosecution that the other acts evidence was not barred by the

nonprosecution agreements. Further, the trial court reasoned that the prosecution's stated purposes in seeking to admit the other acts evidence—to prove motive, intent, and scheme, plan, or system—were proper and specifically permitted by MRE 404(b). The court found, “that the other acts evidence does tend to establish that Defendant hated women and is relevant to prove Defendant's motive for allegedly attacking Dutcher.” Although noting that only one proper purpose is necessary to admit other acts, the trial court also agreed with the prosecution that the other acts evidence was relevant “to show that Defendant acted with premeditation and deliberation, and that he planned to kill his victims from the time he identified them.” With respect to using the other acts to show defendant's scheme, plan, or system, the trial court rejected defendant's argument that the other acts were not sufficiently similar to the charged offense to be admissible. To complete its analysis, the trial court ruled that the other acts evidence should not be excluded on the basis of the danger of unfair prejudice. The court reasoned the evidence was not marginally probative but rather “compellingly powerful evidence” of motive. Accordingly, the trial court ruled the danger of unfair prejudice did not substantially outweigh its probative value. The trial court further ruled it would instruct the jury to limit the use of the evidence to its proper purposes.

The trial court also granted defendant's motion in limine, ruling that the prosecution would not be permitted to show the circumstances of defendant's statements unless defendant sought to impeach the evidence. But, the court ruled it would permit the prosecution to elicit from witnesses testifying about defendant's statements that defendant was not asked about committing any crimes in Oakland County.

*3 A jury trial was conducted between November 8, 2004 and November 17, 2004. After the jury began its deliberations, the foreperson sent a note to the trial court that one of the jurors “casually mentioned that he visited the crime scene.” The trial court and the parties all agreed to remove the juror from the jury and replace him with the alternate juror who had been sequestered with a deputy sheriff. The trial court denied defendant's motion for mistrial on the basis that the excused juror might have tainted other

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members of the jury, ruling it had no information the excused juror had said anything to taint the jury. The jury returned its verdict of guilty of first-degree premeditated murder. Defendant now appeals by right.

II. Evidentiary Issues

A. Standard of Review

We review the admission or exclusion of evidence by the trial court for a clear abuse of discretion. *People v. Starr*, 457 Mich. 490, 494; 577 NW2d 673 (1998). A trial court abuses its discretion when its decision is so palpably and grossly contrary to fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but its defiance. *People v. Hine*, 467 Mich. 242, 250; 650 NW2d 659 (2002). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.* Even if preserved, nonconstitutional evidentiary error will not merit reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v. Lukity*, 460 Mich. 484, 495-496; 596 NW2d 607 (1999). Questions of law affecting the admissibility of evidence are reviewed de novo. *Id.* at 488.

An unpreserved claim of evidentiary error is reviewed for plain error. MRE 103(d); *People v. Carines*, 460 Mich. 750, 763; 597 NW 2d 130 (1999). To obtain relief a defendant must persuade the Court that an error occurred, which was plain, clear or obvious, and which affected the defendant's substantial rights because it affected the outcome of the proceedings. *Id.* Reversal is warranted only when plain error results in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of guilt or innocence. *Id.*; *People v. Knox*, 469 Mich. 502, 508; 674 NW2d 366 (2004).

B. *Miranda*

Defendant first argues that the other acts evidence introduced through statements he made to the police should have been suppressed as the product of custodial interrogation without defendant having been advised of and waiving his rights as enunciated in *Miranda v. Arizona*, 384 U.S. 436, 467-479; 86 S Ct 1602; 16 L.Ed.2d 694 (1966). Because defendant did not object on this basis in the trial court it has not been preserved. *People v. Aldrich*, 246 Mich.App 101, 113; 631 NW2d 67 (2001). We conclude that plain error warranting reversal has not occurred.

*4 The Fifth Amendment precludes a person from being compelled to be a witness against himself in a criminal trial. US Const, Am V. To ensure the protection of the Fifth Amendment right to be free from compelled self-incrimination during the inherently coercive environment of custodial interrogation, the United States Supreme Court articulated the rule that the police must advise a suspect in custody that he has the right to remain silent, that anything he says may be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him before any questioning. *Miranda*, *supra* at 467-479; *People v. Daoud*, 462 Mich. 621, 632-633; 614 NW2d 152 (2000). "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, *supra* at 444. Generally, statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his so-called *Miranda* rights. *Dickerson v. United States*, 530 U.S. 428, 435; 120 S Ct 2326; 147 L.Ed.2d 405 (2000); *People v. Harris*, 261 Mich.App 44, 55; 680 NW2d 17 (2004).

The *Miranda* warnings are designed to protect a suspect's Fifth Amendment right against compelled self-incrimination from being eroded by the inherently coercive environment of custodial interrogation. "The principal rationale of the requirement that *Miranda* warnings be given is to guard against the possibility that government agents might compel an individual to make

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self-incriminating statements while in custody.” *People v. Honeyman*, 215 Mich.App 687; 694; 546 NW2d 719 (1996). Thus, when there is no nexus between the reason the person is in custody and the interrogation such that the custodial setting is utilized to facilitate a statement, *Miranda* is inapplicable. *Honeyman*, *supra* at 694-695. Here, although defendant was in custody for one offense, the custodial setting was not used as a coercive tool to extract defendant's statements as to other offenses.

More important, the facts of this case clearly demonstrate that the custodial setting did not compel defendant's statements to the police. Rather, defendant bargained with the prosecutor through counsel to give the statements in return for immunity from prosecution for the offenses he confessed. Further, when defendant made his statements to the police, he was represented by two attorneys, and both were present while defendant spoke to the police. One of the primary *Miranda* rights is to have counsel present during custodial interrogation. “If [during questioning] the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.” *Miranda*, *supra* at 474. Indeed, the *Miranda* Court recognized that the presence of counsel dispels the compelling atmosphere of custodial interrogation to the point of obviating the need for the familiar *Miranda* warnings. “The presence of counsel ... would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.” *Id.* at 466.

*5 Because the custodial setting here was not used to extract the statements at issue from defendant, and because he was represented by counsel when he voluntarily gave his statements, plain error warranting reversal has not been established by the lack of *Miranda* warnings.

C. Immunity

We conclude the immunity agreement defendant entered with Texas authorities and immunity extended by the Wayne County prosecutor do not bar the use of defendant's statements as evidence in this Oakland County prosecution. Defendant misplaces his reliance on MCL 767.6 and *People v. McIntire*, 461 Mich. 147; 599 NW2d 102 (1999) to argue to the contrary. Defendant was not granted immunity under MCL 767.6 or any other statutory provision that required defendant to waive his privilege against self-incrimination. Instead of formal or statutory immunity, this case involves nonprosecution agreements commonly referred to as “informal immunity” or “pocket immunity.” See *United States v. McFarlane*, 309 F3d 510, 513 (CA 8, 2002), and *United States v. Turner*, 936 F.2d 221, 223 (CA 6, 1991). Informal immunity agreements grow out of the authority of a prosecutor as an executive officer within a particular jurisdiction having the discretion to decide whether and against whom criminal charges will be sought, dismissed, or plea bargained. See, e.g., *Genesee Prosecutor v. Genesee Circuit Judge*, 391 Mich. 115; 215 NW2d 145 (1974), and *Genesee Prosecutor v. Genesee Circuit Judge*, 386 Mich. 672; 194 NW2d 693 (1972). Thus, a prosecutor or comparable officer in another jurisdiction may enter into an agreement with a suspect to forego prosecution of a particular offense or offenses (transactional immunity), or to not to use evidence gained by the suspect's cooperation in a later prosecution against the suspect (use immunity), in return for testimony, or cooperation or a guilty plea in another case. See *United States v. Eliason*, 3 F3d 1149, 1152 (CA 7, 1993); see, also, *State v. Edmonson*, 714 So.2d 1233, 1238 (La, 1998).

In contrast to a formal grant of statutory immunity, informal immunity agreements are contractual in nature and do not generally bind prosecuting authorities who are not a party to the agreement. *Id.* at 1237, citing *Turner*, *supra*. “Like a plea agreement, an immunity agreement is contractual in nature and [is] interpreted according to contract law principles.” *United States v. Black*, 776 F.2d 1321, 1326 (CA 6, 1985). The Eighth Circuit Court of

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Appeals explained:

When a defendant enters an informal immunity agreement with the government rather than asserting his Fifth Amendment privilege against being compelled to incriminate himself, "the scope of informal immunity is governed by the terms of the immunity agreement." *United States v. Luloff*, 15 F3d 763, 766 (8th Cir, 1994). *This is true because an immunity agreement is likened to a contract between the government and the defendant, a concept universally recognized by courts faced with enforcing such agreements.* See, *id.*, *United States v. Crawford*, 20 F3d 933, 935 (8th Cir, 1994) (holding that immunity agreements are analogous to plea agreements and are enforced under principles of contract law, within the constitutional safeguards of due process); *United States v. Conway*, 81 F3d 15, 17 (1st Cir, 1996); *United States v. Cantu*, 185 F3d 298, 302 (5th Cir, 1999); *United States v. Brown*, 979 F.2d 1380, 1381 (9th Cir, 1992); *United States v. Nyhuis*, 8 F3d 731, 742 (11th Cir, 1993), *cert. denied*, 513 U.S. 808; 115 S Ct 56; 130 L.Ed.2d 15 (1994). [*McFarlane, supra* at 514 (emphasis added).]

*6 Applying contract principles to the Texas immunity agreement, we find it plainly provides defendant with transactional immunity from prosecution in the jurisdiction of Houston or Harris County, Texas. The scope of the immunity is also stated to be "the discovery of these bodies or the resolution of these murders." Thus, the Harris County assistant district attorney promised defendant he would not be prosecuted for murders for which he leads police to the victim's bodies or otherwise "resolves." The nonprosecution agreement could extend beyond Houston because defendant "agreed he will lead the police to graves and assist in clearing the offenses in the cities of Austin, Galveston, Texas and the cities of Ann Arbor, Michigan; Kalamazoo, Michigan; Detroit, Michigan, and Windsor, Ontario, Canada." But immunity does not apply in other jurisdictions unless defendant confesses to an offense, and the other jurisdiction has agreed in writing not to prosecute.

Defendant argues that the Texas immunity

agreement must have included use immunity otherwise defendant's Texas lawyers were constitutionally ineffective. This claim is without merit. Use immunity is required only when a person is compelled to waive his Fifth Amendment privilege against self-incrimination. Thus, in the face of the assertion of the privilege against self-incrimination, immunity to compel testimony must be "immunity from use and derivative use [that] is coextensive with the scope of the privilege against self-incrimination." *Kastigar v. United States*, 406 U.S. 441, 453, 460-61; 92 S Ct 1653; 32 L.Ed.2d 212 (1972). Such immunity precludes "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom." *Id.* The fatal flaw in defendant's argument that the Texas agreement should have included use immunity is that defendant was not compelled to waive his Fifth Amendment privilege against self-incrimination. Rather, defendant bargained with Texas authorities to make his statements regarding the murders he perpetrated in return for a promise not to be prosecuted for those offenses. Use immunity must arise either from the government's promise made not to use the evidence or from the defendant's being granted immunity after he invoked the privilege against self-incrimination. *Eliason, supra* at 1153. Here, the Texas authorities promised only that defendant would not be prosecuted for the murders he confessed, and defendant was not compelled to testify after having invoked his right against self-incrimination.

For these reasons, the Texas immunity agreement did not preclude the use of defendant's statements regarding the Texas murders and assaults in this Oakland County prosecution. Accordingly, the trial court did not abuse its discretion in so ruling.

The trial court's decision to admit defendant's statements regarding the 1979 murder of Jean Clyne is more problematic. Then Wayne County Prosecutor William Cahalan specifically extended use immunity to defendant in return for giving a statement regarding that offense. Prosecutor Cahalan wrote:

*7 If your office, Mr. Watts and [defendant's] attorney are in agreement with providing such an interview, the Wayne County Prosecutor's Office

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will agree not to use any statement obtained during this interview in any prosecution of Mr. Watts for the Clyne homicide. Furthermore, we will agree not to use any information obtained from Mr. Watts' statement or evidence developed from information contained in his statement, against Mr. Watts in any future prosecution.

Applying contract principles, the trial court ruled that neither Oakland County nor the state of Michigan was bound by the Wayne County agreement because they were not parties to it. The court also noted that the state of Michigan, through the Attorney General's supervisory relationship to litigation involving the state, never indicated the state as a whole would be bound by the agreement. See *In re Certified Question*, 465 Mich. 537, 545-548; 638 NW2d 409 (2002).

The trial court correctly ruled on this issue. Michigan's statutory scheme in general restricts a county prosecutor's authority to crimes occurring within the county's geographic boundaries.^{FN2}

FN2. Several venue statutes regarding unique situations provide exceptions not applicable here.

The prosecuting attorneys shall, *in their respective counties*, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party or interested. [MCL 49.153 (emphasis added).]

Applying MCL 49.153 in an analogous situation, this Court has held that a Wayne County assistant prosecutor possessed no authority to enter a plea bargain in an Oakland County criminal prosecution. *People v. Stackpoole*, 144 Mich.App 291, 300-301; 375 NW2d 419 (1985). More on point, other jurisdictions applying similar state statutory schemes have ruled that one county prosecutor has no authority to enter an immunity agreement purporting to bind another county prosecutor in the same state. See *State v. Barnett*, 124 Ohio App 3d

746; 707 N.E.2d 564 (1998), and *Staten v. Neal*, 880 F.2d 962 (CA 7, 1989) (applying Illinois law).

Moreover, under contract principles, neither the AG nor the Oakland County prosecutor was a party to the Wayne County immunity agreement, so they are not bound by the agreement from using defendant's admissions regarding the Wayne County murder in the Oakland County murder prosecution. See *Edmonson*, *supra* at 1237 ("informal [immunity] agreements are contractual in nature and do not as a general proposition bind prosecutorial authorities who are not a party to the agreement"), and *Turner*, *supra* at 223 (Informal immunity agreements "are contractual in nature and do not bind other parties not privy to the original agreement." *Id.*, citing *United States v. Peister*, 631 F.2d 658, 662 (CA 10, 1980), *cert den* 449 U.S. 1126; 101 S Ct 945; 67 L.Ed.2d 113 (1981)). Further, the plain and unambiguous language of the agreement bound only the Wayne County prosecutor's office from using defendant's admission: "the *Wayne County Prosecutor's Office* will agree not to use any statement obtained during this interview in any prosecution of Mr. Watts for the Clyne homicide. Furthermore, we will agree not to use any information obtained from Mr. Watts' statement or evidence developed from information contained in his statement, against Mr. Watts in any future prosecution." In context, as used in Prosecutor Cahalan's letter "we" can only refer to the immediately preceding "Wayne County Prosecutor's Office."

*8 Finally, even if the trial court erred in not excluding the evidence of defendant's admissions regarding the Wayne County murder on the basis of use immunity, because we conclude the evidence of the other 16 murders and assaults was properly admitted under MRE 404(b), the error would be harmless under either the standard for ordinary trial error (more probable than not that the error was not outcome determinative), *Lukity*, *supra* at 495-496, or the standard for non structural constitutional error (harmless beyond a reasonable doubt), *Carines*, *supra* at 774.

D. MRE 404(b)

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Defendant argues that the trial court abused its discretion admitting the other acts evidence under MRE 404(b). He contends that because the prosecutor offered the evidence to prove identity through modus operandi, it must satisfy the test enunciated in *People v. Golochowicz*, 413 Mich. 298; 319 NW2d 518 (1982), which requires: (1) substantial evidence that the defendant committed the similar act, (2) some special quality of the other acts that tends to prove the defendant's identity, (3) the evidence be material to the defendant's guilt, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See *People v. Ho*, 231 Mich.App 178, 186; 585 NW2d 357 (1998). We disagree.

In general, all relevant evidence is admissible; irrelevant evidence is not. MRE 402; *Starr, supra* at 497. But evidence of a person's character or a trait of character is generally inadmissible to prove action in conformity with the trait of character. *Id.* at 494; MRE 404(a), (b)(1). Thus, the general rule is that "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v. Crawford*, 458 Mich. 376, 383; 582 NW2d 785 (1998). The evidence, however, may be admitted under MRE 404(b)(1) to show "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..." To be admissible under MRE 404(b)(1), other acts evidence: (1) must be offered for a proper purpose, i.e., to prove something other than propensity to commit like acts, (2) must be relevant under MRE 402, as enforced through MRE 104(b); and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *Knox, supra* at 509; *People v. VanderVliet*, 444 Mich. 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich. 1205 (1994). "Finally, the trial court, upon request, may provide a limiting instruction under Rule 105." *Id.* at 75.

In *People v. Sabin (After Remand)*, 463 Mich. 43; 614 NW2d 888 (2000), our Supreme Court reviewed the use of other acts evidence for the purpose of showing scheme, plan, or system. The Court, citing *People v. Engelman*, 434 Mich. 204;

453 NW2d 656 (1990), noted it had ruled that other acts evidence is not limited to establishing identity or intent, but rather, other acts evidence "that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin, supra* at 61-62. The Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 63. But more than similarity between the charged and uncharged acts is necessary to establish the existence of a scheme, plan, or system. *Id.* at 64. Thus, there must not merely be a similarity in the results, "but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" *Id.* at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in Wigmore). " 'To establish the existence of a common design or plan, the common features must indicate *the existence of a plan rather than a series of similar spontaneous acts*, but the plan thus revealed need not be distinctive or unusual.' " *Sabin, supra* at 65-66, quoting *People v. Ewoldt*, 7 Cal 4th 380, 402; 867 P.2d 757 (1994) (emphasis added).

*9 In *Knox*, our Supreme Court noted that its decisions in *Crawford*, *VanderVliet*, and *Sabin* "continue to form the foundation for a proper analysis of MRE 404(b)." *Knox, supra* at 510. The trial court did not abuse its discretion in applying the principles discussed in these cases and finding sufficient common features in the other acts that are naturally explained as manifestations of a general plan rather than a series of similar spontaneous acts. *Sabin, supra* at 65-66. Specifically, the trial court found the following common features that were evidence of a scheme, plan, or system:

- (1) Watts would follow or stalk his female victim;
- (2) the victim was alone;
- (3) the victim was generally a younger woman (between the ages of 19 and 36, with one victim who was 44);
- (4) Watts would use his Pontiac Grand Prix to identify his victim and position himself for the attack;
- (5) Watts would strike without warning, at random, acting to

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kill his victim quickly, through strangling or stabbing, without provocation or any familiarity with his victim; (6) Watts would not sexually assault his victims; and (7) he often took some personal item as a memento, not because the item had value, but because it was associated with the victim. [Trial court opinion and order, 10/8/2004, p 10.]

The scheme, plan, or system the trial court determined was revealed by the other acts was not necessarily "distinctive or unusual." *Sabin, supra* at 66. Yet, it does possess some unique elements, such as, the use of a particular car to stalk victims, rapid attacks, killing by various means available, and lack of the usual motives for such random attacks-sex or theft. We cannot conclude that the trial court abused its discretion when keeping in mind that the appellate function is not to decide the issue de novo but to determine whether the trial court's decision was so palpably and grossly contrary to fact and logic that it evidences the perversity of will rather than the proper exercise of judgment, *Hine, supra* at 250, and that "a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id.*

Likewise, the trial court did not abuse its discretion in finding the other evidence relevant to the proper purpose of showing a motive for the murder. "Proof of motive in a prosecution for murder, although not essential, is always relevant" *People v. Rice (On Remand)*, 235 Mich.App 429, 442; 597 NW2d 843 (1999); see, also *People v. Fisher*, 449 Mich. 441, 453; 537 NW2d 577 (1995), holding that in a circumstantial murder trial, evidence of motive is highly relevant. In considering admissibility of other acts evidence, the trial court found instructive this Court's decision in *People v. Hoffman*, 225 Mich.App 103; 570 NW2d 146 (1997). In that case, this Court affirmed the admission of other acts evidence tending to establish that defendant hated women as evidence of the defendant's motive for committing an assault with intent to commit murder. *Id.* at 104. The evidence consisted of "testimony from two women whom [the] defendant had allegedly assaulted and battered and to whom he had expressed his general

hatred toward women." *Id.* The *Hoffman* Court, in turn relied on a New Jersey appellate decision that affirmed the admission evidence of racial animus as motive to " 'to explain an otherwise inexplicable act of random violence.' " *Hoffman, supra* at 109, quoting *New Jersey v. Crumb*, 277 NJ Super 311, 317; 649 A.2d 879 (App.Div., 1994). The *Hoffman* panel opined: "Similar to the evidence of racism in *Crumb*, evidence that defendant hates women and previously had acted on such hostility establishes more than character or propensity. Here, the other-acts evidence was relevant and material to [the] defendant's motive for his unprovoked, cruel, and sexually demeaning attack on his victim." So, too, the other acts evidence here showed motive to explain what otherwise might seem to be an unexplainable, vicious murder.

*10 The trial court also did not abuse its discretion in admitting the other acts evidence for the purpose of showing intent, the necessary element in a charge of first-degree murder of premeditation and deliberation. Contrary to defendant's argument, the testimony of eyewitness Foy by itself could not establish that element because it was susceptible of being explained as a sudden affray between lovers or strangers. The admission of the other acts evidence showing scheme, plan, or system permitted the inference that defendant stalked Dutcher in his Pontiac and deliberately, with premeditation, killed her.

We also find that the trial court did not abuse its discretion in concluding that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice. MRE 403. The trial court correctly reasoned the evidence was not marginally probative but rather powerful evidence of motive, and more specifically of premeditation and deliberation. The evidence operated not through a direct propensity of showing defendant killed on other occasions so he killed in this instance, but through the inferences that defendant killed for a reason (motive) and while using a particular method (scheme, plan or system), which together also was probative of premeditation and deliberation. Moreover, the trial court instructed the jury to limit the use of the other acts evidence to its proper purposes. MRE 105; *VanderVliet, supra* at 75. The

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trial court did not abuse its discretion.

Defendant's reliance on the "special quality" test of *Golochowicz* is misplaced because the evidence was properly admitted for proper purposes other than identity. "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes." *Sabin, supra* at 56. Further, in considering the admissibility of evidence under MRE 404(b), a proponent of the evidence need only establish that the evidence is relevant to one proper, noncharacter purpose to secure its admission. *Starr, supra* at 501. Accordingly, even if the evidence was not admissible under *Golochowicz* to directly prove identity, error warranting reversal did not occur.

E. Hearsay/Confrontation Clause

Defendant next argues that portions of the other acts evidence consisted of inadmissible hearsay, such as vital statistics of murder victims and testimony regarding crime scenes. Defendant asserts this violated his constitutional right of confrontation. We hold defendant has waived this argument.

Defendant did not properly preserve a hearsay objection either by raising it in the trial court or by identifying it in his statement of questions presented. MCR 7.212(C)(5); *People v. Brown*, 239 Mich.App 735, 748; 610 NW2d 234 (2000). Defendant's failure to preserve and properly present this claim, and his less than cursory treatment on brief constitutes abandonment of the claim. See *People v. Harris*, 261 Mich.App 44, 50; 680 NW2d 17 (2004), and *People v. Watson*, 245 Mich.App 572, 587; 629 NW2d 411 (2001).

F. Hallway Demonstration

*11 During the presentation of the defense case, defense counsel set up a demonstration in the hallway outside the courtroom to impeach eyewitness Foy. Defendant now argues it was a marginal demonstration and that plain error occurred when defense counsel did not object to testimony noting differences between the actual

time and place when the crime occurred and the hallway demonstration. In essence, defendant argues that the trial court abused its discretion by allowing the demonstration rather than permitting a view of the scene. We disagree.

Error warranting reversal did not occur because a party cannot obtain relief on appeal for an alleged error at trial to which the complaining party "contributed by plan or negligence." *People v. Griffin*, 235 Mich.App 27, 46, 597 NW2d 176 (1999). Here, defendant cannot introduce evidence at trial and claim on appeal that error occurred in its admission. *People v. Knapp*, 244 Mich.App 361, 378; 624 NW2d 227 (2001).

G. DNA Evidence

Next, defendant argues that plain error occurred at trial when DNA evidence was admitted in evidence without a proper foundation that the police testing procedures and statistical data were reliable. MRE 702; *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 779-783; 685 NW2d 391 (2004). Defendant contends that the improper admission of the DNA evidence violated defendant's substantial rights because it established "the res gestae and thereby convicting the defendant." In addition, defendant argues that defense counsel was ineffective for failing to object to the lack of foundation for the DNA evidence. We disagree.

The prosecution used the DNA evidence to establish that blood found on and around Dutcher's body was in fact that of the victim. Although we agree with plaintiff that a sufficient foundation for the admission of this evidence was established, defendant cannot satisfy his burden of establishing the prejudice necessary to warrant reversal even if plain error occurred. Defense counsel cross-examined the prosecution's expert as follows:

Q. Did you find DNA from anybody, any other foreign DNA at all.

A. No, I did not.

Q. So, basically, what you are here to tell the jury today is that you tested all this blood and we know that Helen Dutcher's blood was found at the scene of her murder.

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A. That is correct.

Q. And, there is no other blood or DNA from any other human being at all, nothing else?

A. Not in the samples that were submitted to me, no.

Q. So, just to make sure we are clear about this. Nothing linking Coral Watts, from your point of view.

A. Not in the samples that were submitted to me, no.

So, in the span of a few questions, defense counsel, without objecting to the expert's qualifications, the PCR methodology, the procedures and equipment actually employed, or the database underlying the statistical analysis, established that the prosecution had absolutely no physical evidence linking defendant to the murder of Helen Dutcher. Consequently, defendant cannot establish he was prejudiced by the admission of the DNA evidence. So, even if evidentiary error occurred in the admission of the DNA evidence, and the error was preserved, it would not warrant reversal. *Lukity, supra* at 495-496. Likewise, defendant has failed to establish either outcome-determinative error or overcome the presumption that counsel's tactics constituted sound trial strategy. Thus, defendant's ineffective assistance of counsel claim fails. *People v. Rodgers*, 248 Mich.App 702, 714-715; 645 NW2d 294 (2001).

III. Ineffective Assistance of Counsel

*12 Defendant argues that although his primary defense was identification, his counsel was constitutionally deficient by not raising insanity as an alternative defense. We conclude defendant has failed to overcome the strong presumption that counsel's representation was within the wide range of reasonable professional assistance and that under the circumstances might be considered sound trial strategy.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v. LeBlanc*, 465 Mich. 575, 578;

640 NW2d 246 (2002). Appellate review of a claim of ineffective assistance involves a determination (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by the defective performance. *People v. Toma*, 462 Mich. 281, 302-303; 613 NW2d 694 (2000). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

Although the issue defendant presents on appeal is whether defense counsel was constitutionally ineffective, the body of his argument is no more than an argument for a remand to the trial court for a hearing pursuant to *People v. Ginther*, 390 Mich. 436, 212 NW2d 922 (1973) so that he can search for a basis to establish his ineffective assistance of counsel claim. But this Court has already denied defendant's motion to remand, which asserted the same arguments. Unpublished order of the Court of Appeals issued September 7, 2005 (Docket No. 259903). Defendant asserts the same factual predicate regarding his claim of ineffective assistance in his brief on appeal as he asserted in his motion for remand. Specifically, defendant refers to his own apparent unsworn statements to the author of the presentence information report that "he had been diagnosed with schizophrenia in 1982," and that he "use[d] ... marijuana from 1973 to 1975." To establish his claim of ineffective assistance of counsel, defendant must show both (1) he could have presented a viable insanity defense at trial (prejudice) and (2) either counsel failed to reasonably investigate the defense or unreasonably failed to pursue it (serious error rather than reasonable trial strategy). See *Strickland v. Washington*, 466 U.S. 668, 687, 690-691; 104 S Ct 2052; 80 L.Ed.2d 674 (1984), and *LeBlanc, supra* at 578.

With respect to whether defendant could have presented a viable defense at trial, he must have some evidence that at the time of the offense he had both a mental illness and lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or conform his conduct to the requirements of the law. MCL 768.21a(1).^{FN3} We find that defendant's claim that

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he is now entitled to an evaluation under MCL 768.20a(3) is mistaken. The statutory scheme is clear. An accused who desires to raise the defense of insanity at trial must give notice of his intent to do so "not less than 30 days before the date set for the trial of the case." MCL 768.20a(1). The notice of insanity defense triggers a requirement that the accused "undergo an examination relating to his or her claim of insanity by personnel of the center for forensic psychiatry or by other qualified personnel, as applicable." MCL 768.20a(1). Thereafter, both the defendant and the prosecution have the right to an independent evaluation. MCL 768.20a(3). See *Toma, supra* at 292, n 6. Here, defendant never invoked this process by giving notice before trial of an intent to raise insanity as a defense. The purpose of the statute is "to give an indigent criminal defendant the opportunity to prepare a defense of insanity at public expense," *People v. McPeters*, 181 Mich.App 145, 151; 448 NW2d 770 (1989), not to afford an opportunity to go fishing for post-conviction relief.

FN3. Both plaintiff and defendant mistakenly assume that had defendant asserted insanity as a defense at trial he would have had the burden of establishing that affirmative defense by the preponderance of the evidence. But this Court has held that the application of MCL 768.21a, as amended by 1994 PA 56, to offenses occurring before the effective date of its amendment violates the Ex Post Facto Clauses of the federal and state constitutions, U.S. Const, art I, § 9, cl 3; Const 1963, art 1, § 10. *People v. McRunels*, 237 Mich.App 168; 603 NW2d 95 (1999). Before October 1, 1994, a defendant in a criminal proceeding was presumed sane but once any evidence of insanity was introduced the prosecution bore the burden of establishing defendant's sanity beyond a reasonable doubt. *People v. Stephan*, 241 Mich.App 482, 488-489; 616 NW2d 188 (2000); *People v. Bailey*, 142 Mich.App 571, 572-573; 370 NW2d 628 (1985). The definition of legal insanity was substantially the same in 1979 as it is

currently. See *People v. Crawford*, 89 Mich.App 30, 35; 279 NW2d 560 (1979).

*13 The real questions raised by defendant's claim of ineffective assistance of counsel is what information defense counsel possessed when preparing for trial and whether strategic choices counsel made based on that information were objectively unreasonable under prevailing professional norms. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland, supra* at 691. Here, while defendant moved to remand for a *Ginther* hearing, he neither supplied his own affidavit nor the affidavit of defense counsel to shed any light on these questions. Thus, defendant failed to comply with MCR 7.211(C)(1) by providing an offer of proof regarding the facts to be established on remand.

"The role of defense counsel is to choose the best defense for the defendant under the circumstances." *People v. Pickens*, 446 Mich. 298, 325; 521 NW2d 797 (1994). Moreover, counsel has broad discretion in making strategic trial choices. *Id.* Thus, appellate scrutiny of counsel's decisions must be highly deferential. *Strickland, supra* at 689. Here, the available record reveals that counsel effectively pursued the defense of misidentification. Indeed, defendant concedes on appeal that identification was his primary defense. Nevertheless, defendant contends he could have also pursued the inconsistent defense of insanity without undermining his primary defense by convincing the trial court permit a bifurcated trial. Although, this Court has held it within the trial court's discretion to bifurcate a trial, those cases uphold trial courts in denying such requests by defendants. See *People v. Furman*, 158 Mich.App 302, 320; 404 NW2d 246 (1987), and *People v. Meatte*, 98 Mich.App 74, 79; 296 NW2d 190 (1980). As this Court has noted, "[t]he right of a defendant to raise alternative defenses does not imply a concomitant right to sketch each defense on the clean slate of a naive jury." *Id.*

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A defendant presenting a claim of ineffective assistance must overcome the strong presumption that counsel's representation was within the wide range of reasonable professional assistance and that under the circumstances might be considered sound trial strategy. *LeBlanc, supra* at 578, citing *Strickland, supra* at 689. Counsel is not ineffective when choosing one defense over another, particular when in counsel's professional judgment one of the defenses has a greater chance of success in light of available evidence. *People v. Lloyd*, 459 Mich. 433, 449; 590 NW2d 738 (1999); *People v. LaVearn*, 448 Mich. 207, 216; 528 NW2d 721 (1995). In the absence of any evidence to the contrary, this Court must presume that defense counsel's decision to pursue defendant's primary defense of misidentification was a matter of reasonable professional judgment and sound trial strategy. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v. Bailey*, 175 Mich.App 743, 747; 483 NW2d 344 (1989). Consequently, defendant has failed to overcome the strong presumption that counsel's representation was constitutionally adequate.

IV. Mistrial

*14 Defendant argues that the trial court abused its discretion by not granting his motion for mistrial after it was revealed a juror visited the crime scene. "The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted." *People v. Wells*, 238 Mich.App 383, 390; 605 NW2d 374 (1999). To warrant reversal, the court's ruling "must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *Id.*

Here, the trial court properly removed the wayward juror and substituted an alternate juror with the consent of both the prosecutor and defendant. Defendant offers no argument on how a lone removed juror's unauthorized view of an area where the crime had occurred years ago caused him prejudice. Nor has defendant offered any argument

regarding what prejudicial information this juror could have possibly learned that could have been passed to other jurors to deny defendant a fair and impartial trial. Defendant has simply failed to satisfy his burden of persuasion that the circumstances regarding the removed juror create an inference that defendant's right to a fair and impartial trial was prejudiced. We conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

We affirm.

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Only the Westlaw citation is currently available.

Superior Court of Maine.

STATE of Maine

v.

Patrick ALEXANDRE

No. CR-01-847.

May 16, 2003.

ORDER

JABAR, J.

*1 Pending before the Court is Patrick Alexandre's (the "Defendant") Motion to Suppress. Donald F. Brown, Esq., for the Defendant and Assistant Attorney General, Fernald LaRochelle for the State. For the following reasons the Court denies the Defendant's motion.

Background

The Defendant contacted the Maine State Police while incarcerated at the Penobscot County Jail on a West Virginia fugitive from justice charge. He stated in a note that he wished to talk to investigators about a murder. Sgt. Vicki Gardner, Trooper Seth Edwards and Trooper Scott Hamilton responded to the note and Trooper Edwards advised the Defendant of his Miranda rights. The Defendant indicated that he would only talk to specific officers and wanted to speak to his attorney.

On or about November 27, 2000, Maine State Police Special Agent Kenneth MacMaster ("MacMaster") met with the Defendant and his attorney Christopher Smith. The Defendant and his attorney had time to consult before and during the interview. MacMaster did not advise the Defendant of his Miranda rights. There was an initial discussion about what the Defendant wanted in exchange for his information and eventually the

Defendant revealed that he was referring to the murder of Joseph Cloak. The Defendant then gave some general information about the location of Clark's body.

On November 28, 2000, the Defendant, attorney Smith and an Assistant United States Attorney reviewed a proffer agreement that the Defendant eventually signed. After signing the proffer agreement Detective Steve Pickering, MacMaster and Sgt. Christopher Coleman met with the Defendant and attorney Smith. It appears that attorney Smith was present for most, but not all of the interview. Detective Pickering advised the Defendant of his Miranda rights before beginning the interview. After reviewing the fact that the police were not making the Defendant any promises, and that he had no immunity for crimes of violence, the Defendant told the police how Cloak disappeared. The Defendant told the officers that he could take them to the burial site and he and attorney Smith agreed that he would go with the officers the next day. The parties understood that attorney Smith would not be present during this trip. On November 29, 2000, the Defendant, MacMaster, and other police officers traveled from the Penobscot County Jail to Bradford, Maine. Attorney Smith was not present during the trip to Bradford and no one advised the Defendant of his Miranda rights. The police eventually recovered the body.

On December 1, 2000, the Defendant went to the U.S. Attorney's office for an interview. Attorney Smith was present during most of the interview. No one advised the Defendant of his Miranda rights but attorney Smith agreed that the Miranda waiver from November 28, 2000, was still in effect. The Defendant discussed his reasons for coming forward and acknowledged that he wished to "beat" the charges in West Virginia. He noted that although he did not get exactly what he wanted he was going to continue to provide information. At some point there was a discussion about a polygraph test and the Defendant stated he would leave the decision up

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to attorney Smith. Towards the end of the interview attorney Smith announced that he needed to leave. The Defendant stated that he would continue the interview and would refuse to answer questions he did not feel comfortable answering.^{FN1}

FN1. The Defendant refers to a separate interview on December 1, 2000. However the State has not sought to introduce any statements made during this interview. Even if the police needed to advise the Defendant of his Miranda rights during the interview, failure to advise is not a constitutional violation. The Fifth Amendment does not guarantee Miranda warnings or the presence of counsel; those are court created prophylactic procedures. The Fifth Amendment only protects against self-incrimination. Since the State does not intend to introduce statements made during this interview the Fifth Amendment is not implicated.

*2 On December 2, 2000, the Defendant left the Penobscot County Jail and was taken to the Criminal Investigation Division of the Maine State Police at the Bangor Mental Health Institute to take a polygraph test. The police informed the Defendant and attorney Smith that attorney Smith could not be present in the testing room during the actual examination. Before beginning the examination Detective Keegan went over a two-page document detailing the polygraph procedures.^{FN2} Detective Keegan then read the Defendant his Miranda rights. At some point the Defendant stated, "I can have my attorney present when being questioned?" Detective Keegan replied, "present, means present in the building." At this time the Defendant asked to speak with his attorney and have him look over the waiver form before he signed it. Detective Keegan left the room and upon his return advised the Defendant that attorney Smith signed the waiver and stated that Attorney Smith advised him to sign it.^{FN3} During the examination Detective Pickering watched through an observation room. It is not clear if attorney Smith was aware that he could observe from this location.

FN2. The Defendant notes that he cannot read without his glasses and states he did not have them at that time. However there is no evidence that the Defendant ever signed anything that he did not read and further the evidence shows that the Defendant was never in a situation where his eyesight hindered his understanding of any documents.

FN3. Due to the Court's decision in this matter it is not necessary to examine whether this was a valid waiver.

After the polygraph examination Detective Keegan briefly left the room and returned to inform the Defendant that had failed the exam. At this time Detective Pickering and Detective Keegan interviewed the Defendant in the presence of attorney Smith. During this interview the Defendant privately consulted with attorney Smith twice. After consultation, and a reminder that he could still face prison time in West Virginia, the Defendant changed his story regarding Cloak's death. After each consultation with Attorney Smith the interviewing officers noticed that the Defendant sanitized his story. The Defendant told the officers that he did not want to make certain statements without first talking to Attorney Smith. He told the officers that he contacted the police regarding Cloak's death because he wanted to go home and he acknowledged that he made a mistake by not being completely honest from the start.

On December 7, 2000, Detective Pickering and Detective Keegan interviewed the Defendant, in the presence of attorney Smith.^{FN4} No one advised the Defendant of his Miranda rights at this interview. Attorney Smith and the Defendant reviewed a proffer agreement from the Maine Attorney General's Office that the Defendant eventually signed. The Defendant reviewed his earlier statements with the officers and stated that he wanted to work with the police and put the matter behind him. He acknowledged that he could not play games and the police informed him that if he could not give verifiable information there was no sense in continuing. The Defendant then gave another version of the circumstances surrounding

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Cloak's death. Eventually the Defendant was indicted and arrested for the murder of Joseph Cloak.

Miranda

November 26-December 2

FN4. The Defendant mentions an interview that allegedly occurred on December 3, 2000. However, the State has not sought to introduce any statements made during this interview. Even if the police needed to advise the Defendant of his Miranda rights during the interview, failure to advise is not a constitutional violation. The Fifth Amendment does not guarantee Miranda warnings or the presence of counsel; those are court created prophylactic procedures. The Fifth Amendment only protects against self-incrimination. Since the State does not intend to introduce statements made during this interview the Fifth Amendment is not implicated.

The Defendant seeks to have his statements suppressed and alleges that the police failed to properly advise him of his Miranda rights in violation of the Fifth Amendment and violated his Sixth Amendment Right to counsel. The Defendant further alleges that due to a history of drug abuse and mental illness his statements were not voluntary.

Discussion

Sixth Amendment

*3 The Sixth Amendment right to counsel does not attach until a defendant has reached a critical stage in a criminal proceeding. *State v. Bavouset*, 2001 ME 141, ¶ 4, 784 A.2d 27. In other words, the Sixth Amendment is not triggered until the State brings criminal charges. *Jenness v. Nickerson*, 637 A.2d 1152, 1156 (Me.1994). It is clear that at the time the Defendant made his statements the State had not charged the Defendant with any crime relating to Cloak's death and therefore he did not have a Sixth Amendment right to counsel.

The police must advise a suspect of his Miranda ^{FN5} rights before subjecting him to custodial interrogation. *State v. Higgins*, 2002 ME 77, ¶ 12, 796 A.2d 50. "Custodial interrogation" is questioning initiated by law enforcement officers of a person in custody or otherwise deprived of his freedom of action in any significant way. *Id* (internal citations omitted). Therefore, in order for Miranda to apply, a person must be in custody and subject to interrogation. The Court concludes that the Defendant was not in custody for Miranda purposes during the interviews dated November 27, 2000, through the polygraph examination on December 2, 2000, and that even if the Defendant was in custody he was not subject to interrogation. The Court further concludes that even if the Defendant was in custody and subject to interrogation the police did not need to advise the Defendant of his Miranda rights because counsel was actually present.

FN5. *Miranda v. Arizona*, 384 U.S. 436 (1966).

A defendant is in custody if he is under formal arrest or subject to a "restraint on freedom of movement to the degree associated with formal arrest." *Id* (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)). It is undisputed that the Defendant was in custody in the Penobscot County Jail. The United States Supreme Court, in *Mathis v. United States*, 391 U.S. 1, 4-5 (1968), stated that "nothing in the Miranda opinion ... calls for the curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." The fact that a person is incarcerated for a crime, different from one police are presently investigating, does not remove the need for Miranda warnings.

However *Mathis* did not stand for the premise that every incarcerated person is in custody for the purposes of Miranda. *United States v. Chamberlain*,

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163 F.3d 499, 502 (8th Cir.1998).^{FN6} Incarceration does not ipso facto constitute custody. *Id*; *Alston v. Redman*, 34 F.3d 1237, 1245 n. 6 (3rd Cir.1994); *United States v. Willoughby*, 860 F.2d 15 (2nd Cir.1988). The Supreme Court itself noted, "the bare fact of custody may not in every instance require a warning." *Illinois v. Perkins*, 496 U.S. 292, 299 (1990). Other Courts have noted that to create a per se rule that all investigatory questioning that occurs inside a prison requires Miranda warnings would disrupt prison administration and would create a situation in which Miranda provides greater protection to prisoners than to nonimprisoned individuals. *United States v. Menzer*, 29 F.3d 1223, 1231 (7th Cir.1994)(citing *Cervantes v. Walker*, 589 F.2d 424, 427 n. 7 (9th Cir.1978)).

FN6. The Court notes that the First Circuit (and various other courts), citing *Mathis* has held that a prison inmate was in custody for Miranda purposes. *Palmigiano v. Baxter*, 510 F.2d 534 (1st Cir.1974) (rev'd on other grounds). However, those courts did not address whether *Mathis* created an ipso facto rule regarding custody. See *United States v. Conley*, 779 F.2d 970, 972 n. 3 (4th Cir.1985).

*4 Incarceration is however relevant and the Court must include the fact of incarceration in its custody determination. *Chamberlain*, 163 F.3d at 502. The prison setting may increase the likelihood that an inmate is in custody. *United States v. Smith*, 7 F.3d 1164, 1167 (5th Cir.1993)(noting that it is generally accepted that an inmate is not always "in custody" for Miranda purposes). The Court examines the totality of the circumstances to determine whether an inmate is "in custody". *Menzer*, 29 F.3d at 1232, *State v. Higgins*, 2002 ME 77, ¶ 13 796 A.2d 50. In non-prison settings a defendant is in custody if he is under formal arrest or subject to a "restraint on freedom of movement to the degree associated with formal arrest." *State v. Higgins*, 2002 ME at ¶ 12. Applying the traditional custody test to individuals in prison would result in a per se finding that all incarcerated persons are "in custody" that, as discussed above, does not follow from the Supreme

Court's decisions concerning Miranda and prison inmates. *Conley* 779 F.2d at 973.

To determine whether a prisoner was "in custody" for Miranda purposes Courts have considered whether an inmate was subjected to more than the usual restraint on his liberty, *Id* (citing *Cervantes*, 589 F.2d at 428); and whether there was a measure of compulsion beyond confinement, *Willoughby*, 860 F.2d at 24. The Court in *Chamberlain*, citing *United States v. Griffin*, 922 F.2d 1343, 1349, (8th Cir.1990), used a six factor analysis to determine whether an inmate was in custody. The Court focused on whether (1) the suspect knew the questioning was voluntary and knew he was either free to leave or free to request the officers to leave; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact or acquiesced to official requests; (4) what types of tactics were used during questioning; (5) whether the atmosphere was police dominated; or (6) whether the suspect was placed under arrest after questioning. *Chamberlain*, 163 F.3d at 503. The list is not exhaustive and the issue focuses upon the totality of the circumstances. *Id*.

The Colorado Supreme Court, citing *Cervantes*, considers (1) the language used to summon the individual, (2) the physical surroundings of the interrogation; (3) the extent to which he is confronted with evidence of his guilt; and (4) the additional pressure exerted to detain him. *People v. Denison*, 918 P.2d 1114, 1116 (Co.1996). The Supreme Judicial Court of Massachusetts accurately sums up the variety of tests and determines whether "the prisoner would reasonably believe himself to be in custody beyond that imposed by the confines of ordinary prison life." *Commonwealth v. Girouard*, 766 N.E.2d 873, 880 (Ma.2002).

Turning to the present matter, the Court agrees that neither *Miranda* nor *Mathis* establishes a per se rule that all questioning of incarcerated persons requires Miranda warnings. The Court will examine the totality of the circumstances to determine if a reasonable person would believe himself to be in custody beyond that normally associated with prison life.

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*5 The Court notes that the Defendant voluntarily contacted the police and offered to provide information regarding a murder. The Defendant offers no evidence to suggest that he was ever in custody beyond what one would normally associate with prison life. Although not required the investigators read the Defendant his Miranda rights before the initial interview and the interviews on November 28 and December 2. The Defendant frequently stopped the proceedings to speak with his attorney and receive advice supporting the conclusion that the Defendant understood he was acting voluntarily. In fact the Defendant stated that he would not answer questions that he did not want to, indicating the police were not exerting pressure. The Defendant negotiated two proffer agreements with the assistance of counsel but there is no evidence that the officers made any additional promises or exerted any pressure on the Defendant. The Defendant stated numerous times that he was coming forward to "get this behind him" and move on with his life. Considering the fact that the Defendant was incarcerated, there was not an overbearing police dominated atmosphere. The Defendant spoke with his attorney and even requested specific officers. Although the interviews were lengthy neither the Defendant nor his attorney objected. The Defendant was not arrested until after the grand jury indicated him.

Additionally, the officers involved did not consider the Defendant a suspect until some time after the polygraph test.^{FN7} The Supreme Court has stated, "a police officer's view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda." *Stansbury v. California*, 511 U.S. 318, 329 (1994). However, an officer's knowledge or beliefs may bear upon the custody issue if the officer conveys those beliefs. *Id* at 300.

FN7. There is no evidence that the officers relayed their suspicion to the Defendant after the polygraph examination. Therefore, the fact that the Defendant was a suspect after the polygraph does not necessarily indicate the Defendant was "in

custody". Considering the Court's decision below, concerning the post-polygraph interviews, it is not necessary to determine whether the Defendant was "in custody" or subject to "interrogation" after the polygraph examination.

The present situation is a clear instance where the officers conveyed their belief that the Defendant was not a suspect. The Defendant approached the officers as a witness, the Defendant was operating under two proffer agreements, the officers never accused the Defendant of the crime, never confronted the Defendant with evidence tending to point to the Defendant's guilt, and never treated the Defendant as anything but a witness.

The Court is free to consider the fact that a defendant was not a suspect when determining whether the defendant was subjected to custodial interrogation. *O'Donnell v. State*, 374 S.E.2d 729, 732 (Ga.1989)(a person is not in custody when being questioned if not a suspect); *State v. Longley*, 483 A.2d 725, 730 (Me.1984); *Commonwealth v. Gil*, 471 N.E.2d 30, 37 (Ma.1984)(evidence showing the defendant was not a suspect at the time of questioning and that the interview was devoid of attempts to compel a statement was indicative of a non-custodial interview); *New Jersey v. Seefeldt*, 242 A.2d 322, 327 (N.J.1968); *State v. Beauchage*, CR-85-128, 1985 Me.Super. LEXIS 368, 12 (December 19, 1985, Me.Super.Ct.); *Minnesota v. Johnson*, C2-97-1384, 1998 Minn.App. LEXIS 496, *5 (May 5, 1998, Court of Appeals of Minnesota) ^{FN8} (the officer's questions were an investigation of a witness not a custodial interrogation of a suspect); *Zavala v. Texas*, 956 S.W.2d 715, 724 (Ct.App. Tx., Thirteenth District, 1997).

FN8. Cited pursuant to Minn.Stat. § 480A.08, SUBD. 3.

*6 Considering the above, the Court is satisfied that the Defendant was not "in custody" for Miranda purposes. Further the fact that the police treated the Defendant as a witness, and that the Defendant understood the police were treating him as a

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witness, supports a conclusion that even if the Defendant was "in custody" he was not subject to "interrogation" and therefore Miranda warnings were not necessary. The Supreme Court defined "interrogation" as a "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)(emphasis added). Miranda does not work to prevent an individual in custody from talking with the police without the benefit of warnings and counsel, but only prevents the police from interrogating an individual in custody. *Wilson v. Schomig*, 234 F.Supp.2d 851, 865 (C.D.I.L.2002)(citing *Miranda* at 478).

The Court in *Wilson* held that because the police did not consider the defendant a suspect, the officer's questions were not designed to elicit incriminating statements and therefore did not amount to interrogation. *Wilson*, 234 F.Supp. at 866. When police are investigating a crime and interviewing witnesses there is no motivation to engage in the type of conduct Miranda prohibits and therefore Miranda warnings are not necessary. *Boutwell v. State*, 344 S.E.2d 222, 226 (Ga.1986). Police questioning of individuals in custody does not trigger Miranda unless the purpose of the questioning is to obtain a confession from a suspect. *Corbin v. Indiana*, 563 N.E.2d 86, 90 (In.1990).^{FN9} The police do not need to give Miranda warnings to every witness they question during the criminal fact finding process. *State v. Iverson*, 187 N.W.2d 1, 12 (N.D.1971)(citing *Miranda*); *Commonwealth v. Horner*, 442 A.2d 682, 686 n. 10 (Pa.1982); *State v. Garcia*, 743 A.2d 1038, 1043 (R.I.2000).

FN9. Contra, *State of Ohio v. Holt*, 725 N.E.2d 1155, 1158-59 (Court of Appeals of Ohio, First Appellate District, 1997) (holding, in a case involving a prisoner in custody due to pretrial detention, that "when an individual is in custody for an unrelated matter, any form of police questioning about another crime is interrogation and requires the recitation of Miranda warnings, regardless of whether the individual is a suspect or a witness.") (citing *People v. Lee*, 630 P.2 583

(Co.1981), certiorari denied, 454 U.S. 1162 (1982)).

The police presented testimony that they did not consider the Defendant a suspect until sometime after the polygraph examination. The Defendant voluntarily approached the police and offered information regarding Cloak's murder. At no time before the failed polygraph did the police have any reason to suspect the Defendant and the Defendant's actions confirm that he believed the police were treating him as a witness. Considering the above, even if the Defendant was in custody for Miranda purposes the police did not interrogate him. The police were involved in general investigatory fact finding and treated the Defendant as a witness.

Even if the Defendant was in custody and the police subjected him to interrogation they were not required to advise the Defendant of his Miranda rights because counsel was actually present. Attorney Smith was present on November 27, 2000, November 28, 2000, December 1, 2000, and December 2, 2000 both before and after the polygraph examination. Fidelity to the Miranda doctrine requires courts to strictly enforce it, but only in those situations "in which the concerns that powered the decision are implicated." *Illinois v. Perkins*, 496 U.S. at 296(quoted *Berkemer v. McCarthy*, 468 U.S. 420, 437 (1984)). The presence of counsel ensures that police interrogations conform to the dictates of the Fifth Amendment and ensures that a Defendant's statements are not the product of compulsion. *Minnick v. Mississippi*, 498 U.S. 146, 152 (1990) (citing *Miranda* 384 U.S. at 466). Therefore when counsel is present the "concerns that powered the decision" are not implicated. Miranda warnings are not necessary when counsel is present. *United States v. Guariglia*, 757 F.Supp. 259, 264 (S.D.N.Y.1991); *People v. Mounts*, 784 P.2d 792, 796 (Co.1990)(citing *United States v. Thevis*, 469 F.Supp. 490, 507-508 (D.Conn.1979), aff'd 614F.2d 1293 (2nd Cir.1979); *Baxter v. State*, 331 S.E.2d 561, 568 (Ga.1985). The presence of counsel renders Miranda warnings unnecessary and superfluous. *Collins v. Delaware*, 420 A.2d 170, 176 (De.1980)(citing *United States v. Falcone*, 544 F.2d 607 (2nd Cir.1976).^{FN10}

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FN10. On November 29, 2000, the Defendant accompanied the police to Bradford to recover Cloak's body. Even if the Defendant was in custody and subject to interrogation, and after considering the test the Law Court articulated in *State v. Myers*, 345 A.2d 500, 502 (Me.1975), the Court concludes that the police did not need to re-advise the Defendant of his Miranda rights during the trip to Bradford. See *State v. Smith*, 675 A.2d 93, 98 (Me.1996). The ultimate question is whether the Defendant, with full knowledge of his legal rights, knowingly and intentionally relinquished them. *State v. Meyers*, 345 at 502 (citing *Miller v. United States*, 396 F.2d 492, 496 (8th Cir.1968)). During the November 28, 2000, interview, at which the Defendant was advised of his Miranda rights and at which Attorney Smith was present, the parties agreed to the Bradford trip.

Post Polygraph Statements

*7 Without commenting on whether the Defendant was in custody or subject to interrogation after the police informed him that he had failed the polygraph examination the Court concludes, as discussed above, that the actual presence of attorney Smith rendered Miranda warnings unnecessary.

Voluntary Statements

The Defendant further claims that due to mental illness and a history of drug abuse the statements he made to police were not voluntary. The Court examines the totality of the circumstances when considering whether a defendant's statements are voluntary. *State v. Sawyer*, 2001 ME 88, ¶ 7, 772 A.2d 1173. The Court considers both internal and external factors such as: the details of the interrogation; the duration of the interrogation; the location of the interrogation; whether the interrogation was custodial; whether there was a recitation of Miranda; the number of officer's involved; the persistence of police officers; police trickery or threats and promises; and the defendant's

age, mental health, emotional stability and conduct. *Id.* at ¶ 9. The Court applies these factors to determine if the totality of the circumstances indicates the defendant's admissions were not the result of "his own free will and rational intellect." *Id.* The Court notes that the Defendant was not in custody for any crime relating to Cloak's murder, he approached the police to discuss cooperation, he requested certain police officers, even though not required the police advised him of his Miranda rights, and he had the assistance of his attorney throughout the process. In addition the Defendant was operating pursuant to two proffer agreements and the Court finds there were no additional promises, threats, or acts of coercion on the part of the police. As discussed above, the police did not interrogate the Defendant, were not confrontational, and did not coax the defendant into confessing. See *State v. Cole*, 1997 ME 112, 695 A.2d 1180 (finding that although the police at times approached the interrogation in a confrontational manner and at times coaxed the defendant into confessing, the defendant's confession was still voluntary).

The Defendant claims that his history of mental illness and drug abuse renders his statements involuntary. The Court has examined the transcripts and videotapes of the interviews and taken into account the expert testimony presented during the hearing in this matter. Four experts testified during the hearing, and this court finds and concludes that the opinion of Dr. Shetky, a psychiatrist, was the most compelling. Her opinion and the reasons for her opinion were more in line with the facts and images seen in the videotapes and the transcripts than the testimony of the experts presented by the defense. She opined that the mental health problems of the defendant did not render his statements to the police involuntary. Based on the totality of the circumstances, the Court concludes that the Defendant's history of drug abuse and mental illness did not render his statements involuntary. Again, the Defendant approached the police seeking to better his situation, requested the assistance of counsel, stopped the interviews at times to privately confer with his attorney, and acted in a rational, coherent manner throughout the process. See *State v. Addington*, 518 A.2d 449, 452 (Me 1986). The

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State has proven beyond a reasonable doubt that the Defendant's statements were voluntary.

***8 THE DOCKET ENTRY IS:**

The Defendant's Motion to Suppress is hereby denied.

The clerk is ordered to incorporate this decision into the docket by reference.

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