[Cite as *State v. Zich*, 2011-Ohio-6505.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1184

Appellee — Trial Court No. CR0200702164

v.

Thomas Zich — **DECISION AND JUDGMENT**

Appellant — Decided: December 16, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump and Martin E. Mohler, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Thomas Zich, appeals from a murder conviction entered by the Lucas County Court of Common Pleas, in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On June 1, 2007, appellant was indicted on a charge of murder arising out of the death of his wife, Mary Jane Zich, whose body was found in Lucas County on December 18, 1991.

{¶ 3} Before his trial, appellant filed a number of motions, including a motion to dismiss based upon preindictment delay, as well as a motion in limine to exclude testimony by three of appellant's former wives. The trial court denied the motion to dismiss and the motion in limine.

{¶ 4} On the first day of trial, during jury selection, one of the prospective jurors stated that she and her husband worked with appellant and that she had heard gossip about him, but that she could be impartial. The next day, the same prospective juror said she was uncomfortable in court because she was a domestic violence victim. She further stated that her acquaintance with appellant made her very uncomfortable.

{¶ 5} Questioning of the prospective juror continued outside the presence of the other jurors, at which time the prospective juror said that her negative feelings about appellant would, in fact, prevent her from being totally objective. The trial court excused her for cause. Appellant's counsel then moved to voir dire the remaining jurors individually or, in the alternative, to declare a mistrial. The court, after considering the answers that the excused prospective juror gave in the presence of the other prospective jurors, concluded that individual voir dire would create "greater potential for harm by highlighting what [the excused prospective juror] said." On that basis, the trial court denied both motions.

{¶ 6} During the evidentiary portion of the trial, evidence of the following was adduced. Then 26-year-old Mary Jane met then 44-year-old appellant sometime in 1990, while she was working as a waitress. At the time, Mary Jane had a young child, Desiree, from a previous relationship. Mary Jane and appellant married in early 1991.

{¶ 7} Shortly after the marriage began, Mary Jane and appellant started participating in a personal wealth group and purchasing various parcels of real property. During their participation in the personal wealth group, Mary Jane and appellant met witness Michele Mauder and her husband.

{¶ 8} In addition to their acquaintance through the workshops, Mauder and Mary Jane recognized one another as childhood friends, and Mauder recognized appellant from work. Mary Jane and Mauder quickly renewed their friendship. Mauder talked to Mary Jane on a daily basis and visited with her four or five times a week.

{¶ 9} Beginning in March 1991, appellant started visiting Mauder in the morning, after Mauder's husband left for work. During these visits, appellant complained to Mauder that Mary Jane was using drugs, spent too much money, and was seeing someone else. Eventually, Mauder told Mary Jane about the visits, and appellant stopped dropping by as frequently. Mary Jane, on the other hand, began to discuss her marital problems openly with Mauder.

{¶ 10} On a summer evening in 1991, Mary Jane and Mauder went to a "Party in the Park" in Toledo, together with some other female friends. Despite there being no bright sun, Mary Jane was wearing large-frame sunglasses. Mauder pulled the sunglasses

off of Mary Jane's face and saw that underneath the sunglasses Mary Jane had a "big black eye." That evening, Mauder observed appellant following Mary Jane and her group of friends as they moved around downtown. Mary Jane told Mauder on this night that she intended to leave appellant.

{¶ 11} At some point, Mary Jane also discussed with Mauder the possibility of traveling to Wisconsin to talk to several of appellant's ex-wives. Appellant, in a subsequent conversation between himself and Mauder, suggested to Mauder that she tell Mary Jane not to make the trip to Wisconsin. Mauder remarked to appellant that he would not know about Mary Jane's plans to go to Wisconsin unless he had taped their conversation. Appellant responded by stating, "You could say that."

{¶ 12} In the fall of 1991, Mary Jane renewed another former relationship, this time with Kenny Montano. Kenny Montano testified that he and Mary Jane dated from 1981 or 1982 until he was imprisoned in 1984. After his release in 1986, they remained friends. In 1987, Montano was again sent to prison, where he stayed until October 1991. During this period of incarceration, he and Mary Jane wrote to one another and communicated by telephone on a regular basis. Upon his release, on October 10, 1991, Montano began visiting with Mary Jane in person. The friendship soon developed into a romantic relationship. Sometime in October 1991, Mary Jane told Montano that she did not want to be married anymore.

{¶ 13} At about the same time that Montano and Mary Jane renewed their relationship, appellant began to see Luanna Urbanski. Urbanski testified that she met

appellant in August 1991 while she was working as a waitress at a Bob Evans restaurant. At first, the two knew each other only as customer and waitress. Thereafter, Urbanski gave appellant her phone number. During their conversations, appellant told her that his wife was cheating on him and that he was feeling used.

{¶ 14} Urbanski's relationship with appellant began to change on November 17, 1991, when appellant told her that his relationship with his wife was over and that he planned to divorce her. On that date, appellant and Urbanski went out and had a few drinks. Afterward, appellant took her to look at his rental properties and told her that by Thanksgiving Mary Jane would be moving out of the couple's home and moving into one of the rental properties. Appellant complained that Mary Jane was going to "take everything" from him. Urbanski tried to assure him that that had not been her experience, but appellant said that he had "already been taken to the cleaners * * * and he wasn't going to let that happen again."

{¶ 15} On Sunday, November 23, 1991, Mary Jane's family, including Mary Jane, celebrated the Thanksgiving holiday. At that time, the family was busy planning another event, a going-away party scheduled to be held on December 6. Mary Jane volunteered to hire a band for the party.

{¶ 16} Sometime between November 23 and 27, appellant visited Rene Andaverde, one of Mary Jane's brothers. Appellant asked Rene for Kenny's last name, and told Rene that the reason he was asking was that he thought Kenny was seeing Mary

Jane. Rene told appellant that he knew nothing about a relationship between Kenny and Mary Jane, and he declined to give appellant Kenny's last name.

{¶ 17} Two or three days before Thanksgiving Day, Mary Jane spent the night with Montano, at his house, in Toledo. They returned to her house, in Genoa, the next morning so that she could shower and change. Montano said that she showed him through the house, which was clean, and that he saw the bathroom, which was undamaged. Montano testified that he was uncomfortable in the house, so he asked Mary Jane to pack up clothes so that she could shower and change later. Mary Jane complied with Montano's request.

{¶ 18} As they were driving away from the house, Montano stated that Mary Jane saw appellant driving toward them, and instructed Montano to get down in the passenger seat. He further stated that Mary Jane pulled over into a driveway, and that appellant made a U-turn back toward them, pulled off to the side a little and looked at them before he continued driving. Montano and Mary Jane continued on their way to Montano's father's house in Toledo.

{¶ 19} Montano stated that he and Mary Jane stayed at his father's house until Thanksgiving night. On Thanksgiving night, Montano and Mary Jane dropped Desiree off at a babysitter's house, and then spent the night in a motel. The next day, they checked out of the motel and returned to Montano's father's house.

{¶ 20} Montano testified that Mary Jane had planned to give his stepmother a ride to work on her way back home. He also testified that when he saw her last, Mary Jane was wearing pink sweatpants, a sweatshirt and sneakers.

{¶ 21} According to Montano, he and Mary Jane arranged to meet at a dance on Saturday night, and on Saturday afternoon he repeatedly tried, without success, to call her to verify their plans. Mary Jane did not appear at the dance.

{¶ 22} Rachel Montano, Kenny's sister and Mary Jane's friend, testified that she made several calls to the Zich's house after the dance on Saturday, and that appellant said that Mary Jane was not home. When Rachel and Montano were unable to reach Mary Jane, first on Sunday and then again on Monday, they went to the Zich's home. Mary Jane's car was not there, and no one answered the door. They also stopped at the house Montano thought Mary Jane would live in after the divorce, but no one was home, and Mary Jane's car was not there.

{¶ 23} Witness Sandy Schwartz, who was a friend of Mary Jane, testified that "right around Thanksgiving," Mary Jane and Montano dropped Desiree off at her house in the middle of the evening. When Mary Jane picked up Desiree the next day, she told Schwartz that she planned to go home and ask for a divorce. Schwartz never saw Mary Jane again.

{¶ 24} Witness Cheryl Zimmerman, a tenant in appellant's east Toledo, White Street property, testified that in November 1991, while she was preparing food for Thanksgiving dinner, appellant brought Desiree to her house. She stated that she was not

certain of the date, and that it could have been either before or after Thanksgiving Day, because the celebration was planned around her mother's work schedule.

{¶ 25} According to Zimmerman, appellant insisted that she babysit on this occasion, because he had something "very important" to take care of and that he had no other choice but to have Zimmerman watch the child. Zimmerman testified that she did not know appellant well, and did not know Desiree at all. In fact, she testified, she did not know until that time that appellant even had a daughter.

{¶ 26} Zimmerman stated that appellant was gone for about four hours, and when he returned, he picked up Desiree in a hurry and left. Zimmerman never babysat the child again.

{¶ 27} Witness Roger Monroe testified that sometime in November 1991, he was at the Free-Way restaurant, in Oregon, Ohio, when appellant—whom Monroe knew as a fellow customer at the restaurant—asked him for a ride home. Appellant told Monroe that he had locked his keys in his truck and then walked to the restaurant to find someone to give him a ride. (According to appellant, in his 2007 tape-recorded statement to police, on the day he received the ride from Monroe, he started out at one of his various rental properties, walked to his rental property on White—where Zimmerman lived—and then got a ride to the Free-Way restaurant.)

{¶ 28} When Monroe pulled into appellant's driveway, appellant gave him money for gas and thanked him. Monroe observed appellant walk to the front door of his house and then retrieve "a whole handful of keys" from his pocket, before entering his house.

Monroe offered to take appellant back to his truck so he could drive it home, but appellant declined the offer, telling Monroe he would have his wife get it in the morning.

{¶ 29} On Sunday, December 1, appellant took Desiree to Bob Evans. Urbanski was working that day, and when she saw appellant, she approached him and noticed that he was smiling. He told Urbanski that he and Mary Jane had separated, and that Mary Jane had dropped Desiree off on Friday, November 29, and would pick her up on Monday, December 2. That night, Urbanski went to dinner with appellant and Desiree, but afterward told appellant that she did not want to get any more involved with him until after the divorce was final.

{¶ 30} On December 6, appellant appeared at the Andaverde family going-away party with Desiree. Although the band that Mary Jane volunteered to hire was present at the event, Mary Jane herself was not. During the party, appellant told Jose Andaverde, another of Mary Jane's brothers, that Mary Jane had gone to Florida. Jose encouraged appellant to file a missing person report.

{¶ 31} According to Ludvina Andaverde, Mary Jane's sister, sometime after December 6, but before December 18, when Mary Jane's body was found, appellant told Ludvina that Mary Jane was in Florida for rehab.

{¶ 32} On December 7, appellant called the Ottawa County Sheriff's office to report that Mary Jane had been missing since November 29, 1991. Appellant told police that on the day she disappeared, Mary Jane received a phone call at about 7:30 p.m., and left shortly afterwards, leaving Desiree with him. He stated that he and Mary Jane were

going to separate, and that it was unusual for Mary Jane to have left Desiree with him. He further reported that Mary Jane had previously had drug and alcohol problems, that he was not receiving as many phone calls from Mary Jane's friends as he usually did, and that he had received Mary Jane's driver's license in the mail.

{¶ 33} On December 13, appellant called Urbanski. This time, he told her that when Mary Jane left the child on November 29, she was supposed to have been back in an hour—rather than in a few days, as he had initially told Urbanski—and that she never came back. Two days later, Urbanski had dinner with Desiree and appellant. Appellant asked her to come to his house, and when Urbanski said, "what if your wife came home," appellant replied, "trust me, she's not coming home."

{¶ 34} Sometime in December 1991, prior to December 18, witness Tammie Harper noticed a strange car parked in front of her apartment building, on Greenwood. She stated that she knew the car did not belong there, because it had Ottawa County license plates. She further stated that the car had been parked in that spot for about three weeks before she finally decided to break into it and steal the purse that was located on the front seat. She testified that when she opened the purse, she found that it contained about $20 in cash, some gold earrings and a driver's license. Harper kept the money, put the license in a postal box, and gave the earrings away.

{¶ 35} On December 18, 1991, Mary Jane Zich's body was discovered in the locked trunk of her car, on Greenwood, near the Oak Street Tavern in east Toledo.

December 18 was a cold, wintery day, with snow on the ground. The car's right wing window was broken out, and the glove box contained a registration for appellant.

{¶ 36} Mary Jane's body was clothed in a white sweatshirt, pink pants, and white shoes. Inside the trunk, along with Mary Jane's body, was a length of 3/8 inch thick rope.

{¶ 37} When appellant was interviewed by police that night, he said that Mary Jane had spent Thanksgiving with her friend, Rachel, and had come home at about 6:00 p.m., the following day. He repeated his story that Mary Jane had gotten a phone call and then left around 7:30 p.m., after which he did not see her again. He also repeated that his marriage was not going well, and that he and Mary Jane had planned to separate. Finally, appellant reported that the last time he saw Mary Jane, she was wearing pink pants, fit tight around the ankles, and a white sweatshirt with pink on the front.

{¶ 38} Witness Craig Emahiser, who in 1991 was the Clay Township Police chief, testified that after Mary Jane's body was discovered, her family sought to obtain custody of Desiree. Emahiser identified a birth certificate that was produced by appellant in response to the family's request for custody. The birth certificate indicated that appellant was Desiree's father and that Desiree's last name was Zich. Desiree, however, was not appellant's child. She was born in 1988, before appellant met Mary Jane, and her last name was Andaverde, not Zich.

{¶ 39} Forensic pathologist and deputy coroner, Dr. Cynthia Beisser, described several linear abrasions on Mary Jane's neck that were consistent with ligature strangulation. Beisser opined to a reasonable degree of medical certainty that the cause

of death was ligature strangulation, and that the manner of death was homicide. She could not determine a time of death, because decomposition of the body stopped when the body was frozen.

{¶ 40} Beisser testified that she could not exclude exhibit No. 12, a length of 3/8 inch thick rope that was shown to her by the prosecution, as having made the abrasions on Mary Jane's neck.

{¶ 41} Throughout the investigation—both in 1991 and again in 2007, when the case was reopened—appellant maintained that Mary Jane had a drug and alcohol problem, and that he had previously been involved with her treatment for such. Among the drugs he accused Mary Jane of using were cocaine and marijuana.

{¶ 42} Witnesses Mauder and Montano, on the other hand, both testified that they never saw Mary Jane use drugs, and Jose Andaverde denied knowing that Mary Jane had a drug problem.

{¶ 43} The 1991 autopsy—which involved samples that were tested for marijuana, cocaine, alcohol, benzodiazepines, barbiturates and opiates—revealed no signs of drug or alcohol use.

{¶ 44} Numerous witnesses who knew Mary Jane, including appellant, described her as a well-dressed and well-groomed woman.

{¶ 45} There was similar agreement among the witnesses—including appellant, until his 2007 interview—that Mary Jane did not usually leave Desiree with appellant.

There was testimony that Mauder babysat Desiree about twice a week during 1991, and that Mary Jane's mother and her friend Sandy Schwartz frequently babysat the child.

{¶ 46} According to testimony by supervisor of the Toledo Police Department's cold case unit, Toledo Police Sergeant Steven Forrester, investigation of the current case was reopened in 2004, after contact was made by one of Mary Jane's family members. The cold case unit evaluated reports from Toledo, Lucas County, Ottawa County, Clay Township, and several jurisdictions in other states. Investigation revealed, at this time, that between May 28, 1991 and November 4, 1991, appellant and Mary Jane had purchased properties at 311 Whittmore, 808 Earl Street, 733 Noble, 642 White Street, and 634 Williams. The deeds were joint, with rights of survivorship.

{¶ 47} Forrester tape recorded the 2007 police interview with appellant, during which appellant indicated the following: (1) he denied knowing that Mary Jane had a boyfriend before she died, and he denied ever seeing her with another man; (2) he denied that it was unusual for Mary Jane to leave Desiree with him; and (3) he denied that he and Mary Jane were fighting or that the subject of divorce was an issue on the night she left. He did allow that it was not until Mary Jane disappeared that he ever had to find babysitters for the child. When asked why he did not take Desiree to her grandmother's house, he said, "I can't really – I can't really say for sure. I don't really remember." And when asked about a report that the shower curtain in the Zich's bathroom was torn and the shower curtain rod was torn out of the plaster, appellant claimed that that damage had

occurred while appellant and Mary Jane were having sex, "way before" Mary Jane disappeared.

{¶ 48} When the case was reopened, physical evidence was submitted for DNA analysis. Forensic scientist, Stacy Violi confirmed that DNA testing was performed on swabs from Mary Jane's vagina, the rope found with her body, and samples from her sweatshirt. Sperm from the vaginal swab was consistent with Montano's DNA, and cuttings from the sweatshirt were consistent with Mary Jane's DNA. No DNA was detected on the rope.

{¶ 49} Several of appellant's former wives were also permitted to testify at trial. The first of the wives, Hope Ott, testified that she met appellant in 1967 or 1968, when she was 20 years old. They married in September 1968. According to Ott, within three months, the marriage began to deteriorate, and within a short time Ott told appellant that she wanted a divorce. One night, following her declaration that she wanted a divorce, appellant came home, lunged at her, awaking her from her sleep, and started choking her with his hands. Ott played dead and went limp. Appellant picked up her hand, and Ott let it fall back. He put his head on her chest, as if listening for a heartbeat, and then he went to sleep.

{¶ 50} Another wife, Sharyn Bonderud, testified that she met appellant in 1972, after which they dated for two or three months and then married. She stated that in the spring of 1977, she and appellant were at home when he received a phone call from a woman, and afterward left the house. Bonderud followed appellant to a bar, where she

saw him kissing another woman. Bonderud confronted appellant, who told her to follow him home. Bonderud stated that appellant led her to a dark, dirt road, and then stopped his truck. He exited his car and, wearing gloves, went over to the passenger side of Bonderud's car and got in the seat beside her. According to Bonderud, appellant began stroking her hair and telling her, "I really did love you," and then started strangling her with his hands. When Bonderud struggled in response, appellant "went blank," got out of the car, and told Bonderud to follow him home.

{¶ 51} Bonderud did as she was told, and began following appellant once again. She stated that he led her onto a paved road, after which he stopped his truck, for a second time. This time, he exited the truck carrying a rifle. He asked Bonderud if she saw a deer in the field. When Bonderud answered that she did not, appellant told her to look straight ahead. He then walked, with his rifle, behind Bonderud's car. Bonderud immediately drove away and picked up her children from appellant's mother's house. She subsequently filed for divorce.

{¶ 52} A third wife, Beverley Chancey, testified that she met appellant in 1988, when he was a customer at the Bob Evans restaurant where she was a waitress. The two dated for three months and then got married in April of that year. By sometime in October or November 1988, appellant said he wanted a divorce. Chancey taped one of their conversations about why he wanted a divorce, and when she revealed to appellant what she had done, he "went after" her, pushing her against the wall and holding his hand against her neck, until she finally gave him the tape.

{¶ 53} The trial court instructed the jurors that the evidence from Ott, Bonderud and Chancey could not be considered to prove character, but could only be considered in relation to issues of motive, opportunity, intent or identity.

{¶ 54} At the close of the state's case, defense counsel moved for acquittal, based on both the evidence and the theory that venue was improper in Lucas County. The trial court denied the motion.

{¶ 55} The jury found appellant guilty of murder and the trial court sentenced him to fifteen years to life in prison. Appellant timely appealed his conviction, raising the following assignments of error:

{¶ 56} I. "Zich's federal and state constitutional rights to a speedy trial and to due process were violated by the state's delayed prosecution."

{¶ 57} II. "The trial court erred by allowing the state to call 3 of Zich's ex-wives as witnesses who offered evidence of other crimes, wrongs, or acts to prove character."

{¶ 58} III. "Zich's right to a fair trial was violated when the trial court allowed a lay witness to offer expert testimony regarding rope comparison, and similarly asked the coroner for an opinion after admitting she was not an expert in the area."

{¶ 59} IV. "Zich's conviction was against the manifest weight of the evidence."

{¶ 60} V. "There was insufficient evidence to convict Zich of murder."

{¶ 61} VI. "Zich was deprived of his constitutional right to effective assistance of counsel."

{¶ 62} VII. "The Lucas County Court of Common Pleas lacked venue, and Zich's Crim.R. 29 motion to dismiss on that basis should have been granted."

{¶ 63} VIII. "The trial court abused its discretion through several evidentiary rulings during trial which cumulatively prevented Zich from having a fair trial."

{¶ 64} Appellant, in his first assignment of error, argues that the 16 year delay between the commission of the offense and the bringing of the indictment in this case resulted in actual and substantial prejudice to appellant, thereby depriving appellant of his right to due process.

{¶ 65} This court, in *State v. Robinson*, 6th Dist. No. L-06-1182, 2008-Ohio-3498, set forth as follows the law governing preindictment delay:

{¶ 66} "[A]n unjustifiable preindictment delay that results in actual prejudice to a defendant 'violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," * * * and which define "the community's sense of fair play and decency" * * *', and, thus, effectively deprives a defendant of his right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Luck* (1984), 15 Ohio St.3d 150, 159, paragraph two of the syllabus; *United States v. Lovasco* (1977), 431 U.S. 783, 790 (citations omitted); see, also, *State v. Lewis*, 4th Dist. No. 00CA10, 2001-Ohio-2496.

{¶ 67} "To determine whether an indictment should be dismissed as a result of a preindictment delay, the Supreme Court of Ohio, in *State v. Luck*, supra, adopted a test

first used by the United States Supreme Court in *United States v. Lovasco*, supra, and *United States v. Marion* (1971), 404 U.S. 307. That test, as set forth in *Luck*, supra, is as follows:

{¶ 68} "The defendant must first demonstrate that the delay caused actual prejudice to his defense. Id., at 157-158. Once the defendant makes this showing of actual prejudice, the burden then shifts to the state to prove that the reasons for the delay were justifiable. Id., at 158. The court then views the prejudice suffered by the defendant in light of the state's reason for the delay in order to make a determination as to whether the delay resulted in a violation of the defendant's due process rights. Id., at 154.

{¶ 69} "To prove actual prejudice, a defendant must show, by concrete proof, the exculpatory value of any alleged missing evidence. See, *State v. Gulley* (Dec. 20, 1999), 12th Dist. No. CA99-02-004, citing *United States v. Doerr* (C.A. 7, 1989), 886 F.2d 944, 964; *State v. Lewis*, supra, citing *State v. Flickinger* (Jan. 19, 1999), 4th Dist. No. 98CA09; see, also, *State v. Brown*, (Mar. 17, 2000), 4th Dist. No. 98CA25, citing *United States v. Marion*, supra. In other words, a defendant must show how lost witnesses and physical evidence would have proven the defendant's asserted defense. See *State v. Gulley*, supra; *State v. Davis*, 7th Dist. No. 05 MA 235, 2007-Ohio-7216, ¶ 17. ('Without proof of prejudice, meaning something which adversely affects [a defendant's] ability to defend himself at trial, there is no due process violation for preindictment delay in prosecution.'). A showing based on mere speculation will not be found sufficient. See

State v. Gulley, supra; *State v. Brown*, supra. In addition, '[p]rejudice will not be found due to the lack of non-exculpatory evidence.' *State v. Gulley*, supra. FN17

{¶ 70} "FN17. Missing evidence that does not necessarily exculpate a defendant and, therefore, cannot support a finding of actual prejudice, may still be used to attack the credibility of the state's evidence. *State v. Gulley*, supra. In addition, issues concerning why the evidence is missing and what the evidence would have shown may well be relevant to trial. Id.

{¶ 71} "The court, in deciding whether the prejudice that is established by a defendant constitutes 'actual prejudice,' must balance the claimed prejudice against the remaining evidence in the case, including any newly discovered evidence, to determine whether the missing evidence would have minimized or eliminated the impact of the state's evidence. See *State v. Luck*, 15 Ohio St.3d at 154, 157; see, also, *State v. Brown*, supra. Ultimately, the determination of whether there has been 'actual prejudice' involves 'a delicate judgment based on the circumstances of each case.' *United States v. Marion* (1971), 404 U.S. at 325; *State v. McClutchen*, 8th Dist. No. 81821, 2003-Ohio-4802, ¶ 11.

{¶ 72} "If the defendant fails to meet his burden of establishing actual prejudice – that is, if the court determines that the missing evidence would not have significantly minimized or eliminated the impact of the state's evidence – the inquiry ends and the matter is concluded. If, however, the defendant meets his burden of establishing actual

prejudice, the court must go on to determine whether there was any justifiable reason for the delay in prosecution that caused the prejudice. *State v. Luck*, 15 Ohio St.3d at 158.

{¶ 73} "According to the court in *Luck*, '[A] delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant * * * or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased.' Id. The court additionally noted that '[t]he length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable.' Id.

{¶ 74} "If the court, upon viewing the prejudice suffered by the defendant in light of the state's reason for the preindictment delay, finds that the delay was unjustifiable and has resulted in actual prejudice to the defendant, such that he has been deprived of his due process rights, the indictment against the defendant will be dismissed. See *Luck*, supra. In making this determination, a court should bear in mind 'some prejudice' to a defendant occurring from evidence lost over the years does not deprive him of due process; rather, in order for a defendant to be deprived of due process, the prejudice must be substantial. See *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059; ¶ 56; *Lovasco*, 431 U.S. at 796 ('To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.')" Id. at ¶ 118 -125.

{¶ 75} In the instant case, appellant claims that he was prejudiced by the destruction of records made by two psychologists who interviewed Desiree in the early 1990s, following Mary Jane's death. Specifically, appellant claims that the destruction of records denied him an opportunity to prove "manipulation of [the homicide investigation] by the family and police."

{¶ 76} According to appellant, one of the psychologists, Arlynn H. Lyle, told police that she could not verify either that Desiree's memories were authentic or that they were the result of coaching. It is undisputed that by 2007, Lyle had no recollection of the case and did not have any records pertaining thereto. According to one police report, Desiree at one point told Lyle, "I know who killed my mom," but then followed with, "I can't tell."

{¶ 77} The second psychologist, Marcie Martelli, likewise had no recollection of the case and no records of her interviews with Desiree. Desiree, according to a second police report, told Martelli that appellant killed her mother. The same report indicates that on one occasion when Desiree was asked how she knew that appellant killed her mother, she stated, "That's what everyone told me," but on another occasion she answered, "I was there when it happened."

{¶ 78} Upon our review of the foregoing, we find that appellant has failed to demonstrate, by concrete proof, the exculpatory value of the missing records. See *State v. Gulley*, supra; *State v. Lewis*, supra. At best, these records would have served to impeach testimony of witnesses for the prosecution. Indeed, the most likely use of the

records would have been to impeach Desiree's testimony, but Desiree did not testify. As indicated above, "[p]rejudice will not be found due to the lack of non-exculpatory evidence." *State v. Gulley*, supra (evidence going to the credibility of the state's evidence is a matter best left for trial).

{¶ 79} Appellant additionally states that he was prejudiced by the absence of Tennyson Center reports. According to appellant, Clay Township Police reports reflect that the Tennyson Center, a substance abuse treatment center, was "apparently familiar" with Mary Jane, but that she was not at the treatment center in December 1991. Appellant further states that by 2007, the Tennyson Center records were "long-destroyed."

{¶ 80} In light of the testimony by several witnesses in the case that in the months leading up to her death, Mary Jane did not appear to be under the influence of drugs, together with the coroner's toxicology screen, which showed no indications of drug use, we find that appellant has failed to show, by concrete proof, the exculpatory value of these missing records—especially when there is no information as to when Mary Jane was treated, for what problem, or for how long.

{¶ 81} Appellant further claims that he was prejudiced by the absence of "prior records of at least one other missing person's report for [Mary Jane] (9/4/82 until 9/8/82) [that] were no longer available." Again, in this instance, we find that appellant has failed to demonstrate beyond mere speculation the exculpatory value of any such record, which, by appellant's own admission, was made nearly ten years prior to Mary Jane's death and

whose importance appellant asserts without offering any information in support of that assertion, e.g., information as to the circumstances giving rise to the alleged report.

{¶ 82} Next, appellant asserts that "carpet and other items" removed from the Zich's house in 1991 0"would have provided exculpatory evidence." He further complains that "it appears" that a "hair/fiber" that the coroner removed from Mary Jane's finger is missing.

{¶ 83} It is clear from appellant's argument that these missing items would have required additional testing to determine whether they would support appellant's defense. Any claim that the items are exculpatory is nothing more than mere speculation and, as such, is insufficient to establish actual prejudice. See *State v. Gulley*, supra; *State v. Brown*, supra.

{¶ 84} Appellant further claims that he was prejudiced by the unavailability of certain witnesses. To establish a claim of prejudice due to the unavailability of witnesses who would be able to testify on a defendant's behalf, the defendant must: (1) identify the missing witnesses and the subject matter of their testimony; and (2) explain how the missing evidence has impaired his defense. See *State v. Robinson*, supra, at ¶ 126.

{¶ 85} Among the witnesses who appellant claims were unavailable to testify on his behalf are unnamed "employees and patrons of the Oak Street Tavern" who, according to appellant, "could testify as to [Mary Jane's] reckless lifestyle and her double life." Here, appellant fails to specifically identify any of the individual employees and patrons whom he alleges would have provided the desired testimony. Thus, he has failed

to establish a claim of prejudice due to the unavailability of these witnesses. See *State v. Robinson* at ¶ 126.

{¶ 86} Appellant does specifically identify two potential witnesses: (1) the owner of the Cozy Corner bar; and (2) Michael Guerrero. Appellant alleges that the owner of the Cozy Corner bar could have testified that Mary Jane "frequently had males stopping by to visit her," and, further, "quit on 11/13/91 and announced she was moving to Florida." As for Michael Guerrero, appellant cites a police report reflecting that Guerrero told them in 1991 that he had "observed a man follow [Mary Jane] out of the Oak Street Tavern just prior to Thanksgiving," and that Guerrero had given [Mary Jane] a $500 loan. Even if these two witnesses testified as anticipated by appellant, such testimony would not necessarily have exculpated appellant.

{¶ 87} Appellant next offers in support of his claim of actual prejudice a pronouncement that "[t]he state's witnesses admitted to significant memory lapses from 1991." The law is well established that "the mere allegation of faded memory does not rise to the particularized demonstration of prejudice necessary to constitute an unconstitutional pre-accusation delay." *State v. Lewis*, supra.

{¶ 88} Finally, appellant vaguely asserts that his case was prejudiced by the absence of records from a motel "where Montano and [Mary Jane] would stay." In making this assertion, appellant wholly fails to demonstrate the exculpatory value of the missing motel records. See *State v. Gulley*, supra; *State v. Lewis*, supra.

{¶ 89} In determining whether appellant has sustained his burden to demonstrate "actual prejudice," it is necessary to consider the strength of the state's case, because a compelling case will require a higher level of prejudice to warrant dismissal of the indictment. See *Luck*, supra, at 154, 157; *Brown*, supra. As indicated infra, in our analysis of appellant's fourth assignment of error, concerning the weight of the evidence in this case, the evidence of appellant's guilt was strong. In light of that evidence, we are compelled to conclude that any small amount of prejudice that may arguably have been suffered by appellant as the result of the missing evidence (and based upon our analysis above, we do not find that there was any such prejudice) did not constitute "actual prejudice." In this case, the unavailable witnesses, faded memories, and lost records and physical evidence would not necessarily have exculpated appellant. Instead, the missing evidence went to the credibility of the state's evidence, which was a matter best left for trial. See *State v. Gulley*, supra.

{¶ 90} Because appellant has failed to meet his burden of establishing substantial actual prejudice, we need not consider whether there was any justifiable reason for the delay in the prosecution of this case. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 91} Appellant argues in his second assignment of error that the trial court erred by allowing the state to call three of appellant's ex-wives to testify as to other crimes, wrongs, or acts that were committed by appellant.

{¶ 92} Evid.R. 404(B) prohibits admission of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show he acted in conformity therewith." However, such evidence may be admissible for other purposes, "such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. "Ohio courts have held that any claim by the accused that amounts to 'someone else did it, not me' raises the issue of identity." *State v. Richardson*, 6th Dist. No. L-07-1214, 2010-Ohio-471, fn. 2.

{¶ 93} Whether proffered other-act evidence has a tendency to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and whether any of those things is of consequence to the determination of the action in any given case are both questions of law that appellate courts review de novo. *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, ¶ 13.

{¶ 94} Evid.R. 403(A) addresses the question of whether relevant evidence ought to be excluded on the grounds of prejudice, confusion, or undue delay. It requires a trial court to weigh the probative value of particular evidence against the danger that its admission will cause unfair prejudice. *State v. Thomas*, 9th Dist. No. 10CA009756, 2011-Ohio-1629. The trial court's determination in such matters will not be reversed absent an abuse of discretion. Id.

{¶ 95} Here, the state argues that the identity of the perpetrator was the central issue, and that evidence of other acts was admissible to establish identity through a certain modus operandi.

{¶ 96} As set forth by the Supreme Court of Ohio in *State v. Lowe* (1994), 69 Ohio St.3d 527, 531:

{¶ 97} "Other acts may * * * prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged. 'Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).' *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, syllabus. '"Other acts" may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense.' *State v. Smith* (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190, 194. While we held in Jamison that 'the other acts need not be the same as or similar to the crime charged,' *Jamison*, syllabus, the acts should show a modus operandi identifiable with the defendant. *State v. Hutton* (1990), 53 Ohio St.3d 36, 40, 559 N.E.2d 432, 438.

{¶ 98} "A certain modus operandi is admissible not because it labels a defendant as a criminal, but because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator. Other-acts evidence is admissible to prove identity through the characteristics of acts rather than through a person's character. To be admissible to prove identity through a certain modus operandi, other-acts evidence must be related to and share common features with the crime in question." Id.

{¶ 99} In other Ohio cases involving specifically the strangulation murder of a woman, evidence that a defendant, when angered, resorts to choking females has been admitted. See *State v. Hood* (Dec. 16, 1999), 8th Dist. No. 75210 (holding that evidence by two women that defendant choked them during arguments was similar enough to strangulation by ligature to establish identity by modus operandi under Evid.R. 404(B)); *State v. Collymore*, 8th Dist. No. 81594, 2003-Ohio-3328, ¶ 44-45 (holding that, in a trial for the strangulation murder of a woman, the trial court properly admitted testimony that the defendant "when angered, resorted to choking females"); *State v. Robinson* (Dec. 21, 1995), 3rd Dist. No. 3-95-13 (holding that, when a defendant was charged with the strangulation death of his wife, the trial court properly admitted evidence that two years earlier, he had attempted to strangle his wife).

{¶ 100} In the instant case, we find that the three choking events that were testified to by appellant's ex-wives were sufficiently related to and shared common features with the ligature murder of the victim in this case and were, in fact, probative of modus operandi such that the trial court did not abuse its discretion in permitting the other acts into evidence.

{¶ 101} Appellant argues that all of the wives' testimony was too remote in time to have been admissible at trial. Although Ohio law does require a "temporal, modal, and situational relationship" between an alleged crime and other acts, *State v. Gardner* (1979), 59 Ohio St.2d 14, 20, "temporal issues are not solely determinative in consideration of other acts evidence." *State v. Brooks*, 7th Dist. No. 07-MA-79,

2008-Ohio-6600, ¶ 36. Where, as here, other acts evidence "establishes an idiosyncratic pattern of criminal conduct, it is not necessary for the offense at issue to be near in time and place to the other acts introduced into evidence; 'the probative value of such conduct lies in its peculiar character rather than its proximity to the event at issue.'" *Brooks*, supra, at ¶ 36, quoting *State v. McAdory*, 9th Dist. No. 21454, 2004-Ohio-1234, ¶ 18.

{¶ 102} Appellant argues that even if the other acts evidence was relevant, "the prejudice greatly outweighed the probative nature of the evidence because of the significant factual distinctions." Although the testimony of the three ex-wives was prejudicial to appellant's case, it was not unfairly so. Therefore, its admission was not in contravention of Evid.R. 403(A) and did not result in an abuse of discretion on the part of the trial court. Further—especially in light of the trial court's limiting instruction—we find that there is nothing in the record to suggest that the other acts testimony confused or misled the jury.

{¶ 103} For all of the foregoing reasons, appellant's second assignment of error is found not well-taken.

{¶ 104} Appellant argues in his third assignment of error that he was denied his right to a fair trial when the trial court allowed John Buchert, Jr., a lay witness, "to offer expert testimony regarding rope comparison," and, further, asked Dr. Cynthia Beisser, the coroner, "for an opinion after admitting she was not an expert in the area."

{¶ 105} A reviewing court will not reverse a trial court's determination regarding the admissibility of evidence absent a showing of an abuse of discretion. *State v. Shuler*

(2006), 168 Ohio App.3d 183, 2006-Ohio-4336, ¶ 7. An abuse of discretion is more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112.

{¶ 106} Evid.R. 701 provides that testimony by a lay witness "in the form of opinions is limited to those opinions or inferences that are: (1) rationally based on the perception of the witness; and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

{¶ 107} In this case, John Buchert testified that a rope, marked as exhibit No. 12, appeared to be the same type of rope he had seen in appellant's garage. His testimony was "rationally based" on his perception and was therefore appropriate under Evid.R. 701.

{¶ 108} Coroner Beisser testified as to the dimensions of the rope that could have caused the abrasions found on the victim's body. She did not opine that the rope marked as exhibit No. 12 was, in fact, the instrument used to strangle the victim, but rather that that particular piece of rope could not be excluded as the instrument that caused the abrasions on the victim's neck. Such testimony was properly admitted.

{¶ 109} Evid.R. 702 provides for the admission of expert opinion that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Medical testimony that a wound is consistent with the size and shape of an exhibit is admissible, despite the fact that it does not prove that the exhibit was the murder weapon. *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191, 1993-Ohio-170.

{¶ 110} Appellant argues that the source of the rope marked as exhibit No. 12 was never established at trial. This court, in *State v. Jones*, 6th Dist. No. L-09-1002, 2010-Ohio-4054, ¶ 30, set forth the law concerning the admissibility of physical evidence as follows:

{¶ 111} "An exhibit may not be admitted into evidence until it is properly authenticated 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.' Evid.R. 901(A). Testimony by a witness with knowledge 'that a matter is what it is claimed to be' is an acceptable method of authentication. Evid.R. 901(B)(1). As a result, physical evidence may be admissible pursuant to such testimony even if there is no proof of a perfect chain of custody. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 57. A break in the chain of custody goes to the weight of the evidence, not its admissibility. Id." Id.

{¶ 112} Here, in addition to testimony by Buchert that the rope appeared to be the same material as the rope he had seen in the garage, and the testimony by Beisser that the rope could not be excluded as the instrument used to strangle Mary Jane, is a photograph marked exhibit No. 7. Exhibit No. 7 is a photograph of the interior of the trunk of Mary Jane's car at the time it was opened by police. The photograph depicts Mary Jane's body and various items that were in the trunk with the body, including the rope marked as exhibit No. 12. At trial, the photograph was projected onto a video screen, and Toledo Police Detective Douglas Wilbur used a laser pointer to indicate the rope to the jury.

{¶ 113} In considering all of the foregoing, we find that exhibit No. 12 was properly considered to show appellant's access to an instrument that could not be eliminated as the instrument causing Mary Jane's death. Cf. *State v. Garcia* (June 3, 1988), 6th Dist. No. WD-87-49 (holding that the use of physical evidence to portray the type of object described by a witness's testimony, even though it was not the very object referred to, was permissible; further, holding that where there was evidence that a knife was found by police in the car occupied by assailants when they left the scene, an inference could be drawn that the knife was the same knife that the witnesses saw the defendant with).

{¶ 114} Even assuming, arguendo, that the admission of the rope into evidence was error, "the conviction should only be reversed if there is a doubt that the jury's verdict would have been the same without the introduction of the evidence." Id., citing *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 348. Upon a thorough review of the record, we find that it contains ample evidence, even without exhibit No. 12, for the jury to have concluded that appellant is guilty. Thus, appellant's third assignment of error is found not well-taken.

{¶ 115} Appellant argues in his fourth assignment of error that his conviction was against the manifest weight of the evidence. This court has articulated the applicable standard of review as follows:

{¶ 116} "Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins*

(1997), 78 Ohio St.3d 380, 387. Under this standard, this court sits as a 'thirteenth juror' and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we decide that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id.

{¶ 117} "Nevertheless, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998-Ohio-533. Moreover, we must keep in mind that the credibility of the witnesses who testified at trial is chiefly a matter to be determined by the trier of fact. *State v. McDermott*, 6th Dist. No. L-03-1110, 2005-Ohio-2095, ¶ 25, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus." *State v. Terry*, 6th Dist. No. L-06-1298, 2007-Ohio-4088, ¶ 12-13.

{¶ 118} In arguing that his conviction was against the weight of the evidence, appellant states that the state's case was limited to: (1) appellant's (personally acknowledged) lack of emotional response to his wife's death; and (2) the testimony of his ex-wives. First, we note that the evidence cited by appellant is not inconsequential. The law is well-settled that lack of grief in response to a family member's death is relevant to motive. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 86. In

addition, as discussed above, the testimony of appellant's former wives was probative of his identity as the perpetrator of Mary Jane's murder.

{¶ 119} But beyond the evidence cited by appellant, is evidence presented by the state that: (1) appellant appeared at a near-stranger's home around Thanksgiving and insisted that she babysit Desiree; (2) although appellant told Urbanski on December 1 that he and Mary Jane had separated on November 29 and that Mary Jane had left Desiree with him for the weekend with plans to return the following Monday to pick her up, he later told Urbanski that when Mary Jane left on November 29, she was supposed to have been gone for just an hour but failed to return after two weeks; appellant told other individuals, including law enforcement officials, that he last saw Mary Jane on the night after Thanksgiving and that she had left unexpectedly after receiving a phone call; he told still others, including members of Mary Jane's family, that Mary Jane was in Florida for substance abuse rehabilitation; (3) at some point in November 1991, appellant sought a ride from the Free-Way restaurant in Oregon, Ohio to his home in Genoa, Ohio under the pretext that he had left his keys; after arriving at the house, however, he entered the residence using a large wad of keys; (4) appellant denied to investigators any knowledge that his wife was having a relationship with Montano and he denied any familiarity with Montano's name; this, despite testimony from Mary Jane's brother that at some point prior to Mary Jane's disappearance, during the week of Thanksgiving 1991, appellant had asked him about Montano, and despite testimony from Montano that during this same time period, appellant had seen Montano driving down the street with Mary Jane.

{¶ 120} The state's evidence may not be attacked on the basis that it is circumstantial. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. Circumstantial evidence can be as persuasive as, or more persuasive than, eyewitness testimony. See *State v. Jenks* (1991), 61 Ohio St.3d 259, 272. Further, as observed by the United States Supreme Court, "[i]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it," because "[t]he sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States* (1987), 483 U.S. 171, 179-180. In addition, "a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence." Id. at 180.

{¶ 121} Based upon all of the foregoing, we find that there was abundant substantial evidence upon which the jury could conclude that appellant was the person who killed Mary Jane Zich. The record contains no indication that the jury "lost its way" or "created a manifest miscarriage of justice." See *State v. Terry*, supra. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 122} Appellant argues in his fifth assignment of error that there was insufficient evidence to convict him of murder. While a manifest weight challenge questions whether the state has met its burden of persuasion at trial, the test for sufficiency of the evidence requires a determination of whether the state has met its burden of production. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a

determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462.

{¶ 123} Here, as indicated above, we have concluded that appellant's conviction was amply supported by the weight of the evidence; thus, appellant's challenge regarding the sufficiency of the evidence must necessarily fail. See id. Appellant's fifth assignment of error is, therefore, found not well-taken.

{¶ 124} Appellant argues in his sixth assignment of error that he was deprived of his constitutional right to effective assistance of counsel. In order for a defendant to obtain a reversal of a conviction or sentence based on ineffective assistance of counsel, he must prove "(a) deficient performance ('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable')." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 30, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 125} In evaluating appellant's claim of ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at ¶ 31, citing *Strickland*, supra, at 689. In addition, we are mindful that "[t]rial counsel cannot be second-guessed as to trial strategy decisions." Id.

{¶ 126} Appellant first argues that trial counsel should have sought to suppress his 2007 statement to police, because (1) he was not advised of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 444; (2) he was not advised that he was being taped; and (3) he was "lied to when he was told he was not a suspect."

{¶ 127} Only a "custodial interrogation" triggers the requirement to provide Miranda warnings. *State v. Mason* (1998), 82 Ohio St.3d 144, 153; see, also, *State v. Gumm* (1995), 73 Ohio St.3d 413, 429; *State v. Luke*, 3d Dist. No. 1-06-103, 2007-Ohio-5906, ¶ 10. "Custodial interrogation" has been defined as "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.

{¶ 128} "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury v. California* (1994), 511 U.S. 318, 322, quoting *California v. Beheler*, 463 U.S. 1121, 1125. To determine whether a custodial interrogation has occurred, a court must decide how a reasonable man in the suspect's position would have understood his situation. *Mason*, supra, at 154, quoting *Berkemer v. McCarty* (1984), 468 U.S. 420, 442.

{¶ 129} As long as it remains undisclosed, a police officer's subjective view that an individual under questioning is a suspect has no bearing upon the question of whether that individual is in custody. *Stansbury*, supra, at 324. But if the officer's knowledge or

belief is conveyed—either by word or deed—to the individual being questioned, such knowledge or belief may bear upon the issue of custody, but only to the extent that it would have affected how a reasonable person in the position of the individual being questioned would have perceived his freedom to leave. Id. at 325.

{¶ 130} In the instant case, it is undisputed that the interview took place in appellant's home, in the presence of three officers. 59 minutes of the interview were tape-recorded. Nothing in the record suggests that at any time during the interview appellant was ever handcuffed, restrained, threatened, or told that he could not leave. Appellant did not instruct the officers to leave. And there is no evidence to suggest that appellant ever asked for an attorney or attempted to leave the residence.

{¶ 131} Applying these facts to the applicable law, we conclude that a reasonable man in appellant's position would have understood that, during the interview, there was no formal arrest or restraint on his freedom of movement of the degree associated with a formal arrest. See *Stansbury*, supra. Accordingly, we find that appellant was not subject to custodial interrogation during his 2007 interview with police and, thus, was not entitled to receive *Miranda* warnings. We additionally note that the officers violated no law, either federal or state, when they recorded his statement without his knowledge.

{¶ 132} We next turn to appellant's claim that officers "lied to" him when he was told he was "not a suspect." Review of the record reveals that Forrester told appellant that DNA tests revealed that another man's semen was present in the victim's vagina, and

that the investigators would be interviewing that individual but wanted to ensure that they could "clear" appellant.

{¶ 133} Even construing the foregoing as the officers telling appellant that he was not a suspect, deception is only a factor bearing on voluntariness, which, standing alone, is not dispositive of the issue. *State v. Adkins*, 4th Dist. No. 10CA3367, 2011-Ohio-5360, ¶ 43. With regard to both deception and inducement, in order to support a determination that a confession was coerced, the evidence must establish that: (1) the police activity was objectively coercive; (2) the coercion in question was sufficient to overbear defendant's will; and (3) defendant's will was, in fact, overborne as a result of the coercive police activity. Id.

{¶ 134} In the instant case, nothing in the record suggests that the statement to appellant by the officers would have been sufficient to overbear appellant's will, or that such statement actually did overbear appellant's will.

{¶ 135} On the basis of the foregoing, we find that a motion to suppress appellant's 2007 statement to police would have lacked merit. Defense counsel has no obligation to bring a motion lacking merit to the trial court, and failure to do so is not ineffective assistance. See *State v. Edwards* (July 11, 1996), 8th Dist. No. 69077.

{¶ 136} Next, appellant claims that his trial counsel was ineffective in that he never sought access to the grand jury transcripts in this case. In making this argument, appellant expressly makes the presumption that the indictment was based upon testimony provided by Desiree. The argument rests on the assumption that the testimony by

Desiree was impermissible, because she was very young at the time of her mother's death. We note that appellant, in making this argument, fails to support it with any legal analysis.

{¶ 137} Moreover, appellant's argument assumes that a question about the quality of the evidence offered to the grand jury justifies disclosure of proceedings. The Supreme Court of Ohio, however, has held that "[g]rand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts * * * unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer* (1981), 66 Ohio St.2d 139, paragraph two of the syllabus.

{¶ 138} A "particularized need" is shown "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." *State v. Davis* (1988), 38 Ohio St.3d 361, 365. A particularized need is not shown "by attacking the indictment on the basis that the grand jury acted upon inadequate or incompetent evidence." Id. "[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." Id., quoting *United States v. Calandra* (1974), 414 U.S. 338, 344-345.

{¶ 139} Inasmuch as neither federal nor state law supports disclosure of transcripts based on speculation that the grand jury heard incompetent evidence, we find

that trial counsel's failure to file a motion for disclosure premised on such speculation did not constitute error.

{¶ 140} Finally, appellant argues that his trial counsel should have asked Forrester to detail the 2,000 pages of documents he claimed to have reviewed, and should have "grilled" Forrester about timelines and why he did not pursue other leads, as well as inconsistencies in Desiree's statements. Ohio law provides that "[t]he scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101.

{¶ 141} As the state points out: Detailing the 2,000 pages of documents could have solidified the allegations against appellant, and "grilling" the investigator about other leads might have had the effect of strengthening the case against appellant by eliminating other suspects. Moreover, trial counsel succeeded in sharply limiting Forrester's testimony. The prosecution sought to have Forrester testify about his efforts in order to verify various assertions by appellant, but defense counsel objected successfully to each such attempt. Ultimately, a recording of the 2007 interview of appellant was played, but Forrester was only permitted to state the names of witnesses he contacted in an effort to verify appellant's assertions. He was not permitted to offer any additional testimony about what his efforts revealed.

{¶ 142} Because appellant has failed to establish either error on the part of his counsel or prejudice arising from his counsel's performance, appellant's sixth assignment of error is found not well-taken.

{¶ 143} Appellant argues in his seventh assignment of error that the trial court erred in denying his motion to dismiss for improper venue. Ohio's venue statute provides that if the jurisdiction where the offense was committed cannot reasonably be determined, venue is proper in the county in which a body is discovered. See R.C. 2901.12(J). In this case, although there was evidence suggesting that a struggle occurred in the Zich's home in Ottawa County, there was no evidence that the victim died in this struggle. Accordingly, it could not reasonably be determined where the offense occurred. Venue was proper in Lucas County, where the body was discovered, and the trial court correctly denied the motion for acquittal. Appellant's seventh assignment of error is, therefore, found not well-taken.

{¶ 144} Appellant argues in his eighth, and final, assignment of error that the trial court abused its discretion through several evidentiary rulings during trial that cumulatively prevented appellant from having a fair trial.

{¶ 145} We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "'However, in order even to consider whether

"cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" Id. at ¶ 32, quoting *State v. Madrigal* (2000), 87 Ohio St.3d 378, 398. In light of our findings with respect to the other assignments of error, we find the eighth assignment of error not well-taken.

{¶ 146} This conclusion is not altered by the additional so-called "errors" that appellant brings to the court's attention, for the first time, in this assignment of error. Specifically, appellant argues that cumulative error exists in the trial court's (1) denial of individual voir dire of the jury panel; (2) denial of voir dire of appellant's ex-wives; and (3) admission of "rampant" hearsay.

{¶ 147} The denial of individual voir dire of jurors was appropriate given the limited statements in open court by the single prospective juror who worked with appellant. This prospective juror made only limited statements in open court, and the potential for prejudice was insignificant.

{¶ 148} Regarding voir dire of appellant's ex-wives, we note that appellant does not point to any information to be gained by questioning those women outside the presence of the jurors. Their testimony was the subject of extensive pre-trial briefing and arguments, and appellant identifies nothing that went beyond the parties' expectations.

{¶ 149} Finally, appellant, although citing a string of pages, fails to specify the statements contained in those pages that constitute the alleged hearsay and, further, fails to articulate how those statements operated to appellant's prejudice. Without more, we decline to give this aspect of appellant's argument any additional consideration.

{¶ 150} Because appellant has not demonstrated multiple errors, let alone cumulative error, in this case, we conclude that the doctrine of cumulative error is inapplicable and provides no basis for reversal. Accordingly, appellant's eighth assignment of error is found not well-taken.

{¶ 151} For all of the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE