STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS DESHAUN-HUSTON MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED
November 19, 2020

No. 349690
Washtenaw Circuit Court
LC No. 18-000465-FC

Before: JANSEN, P.J., and FORT HOOD and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced defendant to life imprisonment. Defendant appeals as of right. We affirm.

I. BACKGROUND

Defendant murdered his girlfriend, LMB, on June 18, 2017. Defendant and the victim dated for 9 or 10 years and their relationship involved a history of defendant assaulting LMB. Motive evidence was presented that defendant wanted to end the relationship with the victim because he was dating another woman, RC, who was pregnant with his baby.

At the time of her murder, LMB lived with defendant in an apartment in Ypsilanti, however as stated defendant was also in the relationship with RC. Approximately two weeks before LMB's murder, LMB's sister overheard defendant threaten LMB: "bitch I will kill you." On the day before LMB's death, defendant also sent LMB numerous text messages expressing his desire to be with his other girlfriend and to have the baby with her. At the same time, defendant also texted his desire to see LMB dead, stating: "I swear I can't wait until you die," "You will die this summer," and "RIP Bitch."

The evidence at trial indicated that LMB was stabbed repeatedly—and died—in the apartment in Ypsilanti. Significant bloodstaining; including spatter and drops, as well as a saturation stain on the bed; was found throughout the apartment. Three knives, two of which were broken, were found in the apartment. All the knives tested positive for the presence of blood. The

evidence indicated that, after stabbing LMB, defendant washed LMB's body in the shower; he attempted to clean-up blood in the apartment; and defendant then drove LMB's body in a Ford Flex to his cousin's home in Detroit. LMB's body was found on the floor in the backseat of the car.

Before fleeing in his cousin's Yukon, defendant told those present at his cousin's house that he "was sorry" and that he "didn't mean to." During phone calls to his cousin later that night, which were overheard by a family friend, Chavon Patton, defendant confessed to stabbing LMB, admitting that he stabbed her in the stomach because he thought she was sleeping with someone else. Defendant fled the state, and he was later arrested in Alabama. A body-camera video recording of defendant's arrest was played for the jury.

In contrast, the defense theory of the case—based primarily on statements that defendant gave to police—was that three unidentified robbers entered the apartment while LMB and defendant were present and that the robbers stabbed LMB. According to the defense, the robbers were looking for money that LMB stole or they were going to rob defendant because he was a known drug dealer. Significantly, the defense also maintained that, after being stabbed, LMB showered, laughed and talked, and walked unassisted to the Ford Flex of her own volition. Defendant then drove her to his cousin's home because he was afraid to call 911 or take her to a hospital. Defendant seemingly, albeit confusingly, partially relies on evidence that he claimed his hand had been injured.

However, there were numerous inconsistencies in defendant's statement to police, and the forensic evidence and expert testimony refuted defendant's claims that LMB walked to the Ford Flex and that she was alive in the car. For example, a bloody imprint of a body on the floor of the apartment[1] showed where LMB's body had been dragged in or out of the bathroom, belying defendant's claim that LMB showered under her own power. Additionally, there was no blood in the stairwell in the apartment or outside the apartment building to indicate that LMB walked—while alive and bleeding—from the apartment to the car. Instead, according to the pathologist who performed LMB's autopsy as well as other testimony regarding the relative lack of blood on LMB's body and in the car, LMB was dead, and her body had been washed, before she was placed in the vehicle.

Forensic evidence also linked defendant to the murder scene at the apartment and LMB's body. For example, defendant's fingerprints were found on a plastic bag containing a bloody sheet, and bloody footprints on packets of Hawaiian Punch and a plastic bag found on the floor in the apartment were consistent with the right-foot version of a shoe of which defendant had a left-foot version. Scratches on LMB's back contained a mixture of DNA from three individuals (one of whom was LMB), and DNA analysis provided "very strong support" that defendant was one of the contributors. DNA evidence also indicated that LMB's blood was found on defendant's T-shirt, recovered in the Yukon vehicle in which defendant fled from his cousin's home.

[1] The imprint was revealed by using Leuco Crystal Violet, a chemical that turns a visible violet color when it reacts with blood, even if the blood itself is too dilute or minute to be seen.

Defendant attaches to his Standard 4 brief a number of documents appearing to be records reflecting that he made numerous complaints while in jail that his hand was injured. All of those documents, however, reflect that his hands were examined by a doctor and found to be in fine working condition. Furthermore, we have reviewed the body-camera footage of defendant's arrest, and although his hands are only visible briefly, they do not appear to be injured and he appears to use them normally. Indeed, at one point he knocked the arresting officer down after a chase. The arresting officer testified that he weighed 260 pounds and defendant used both hands to push both himself and the officer up off the ground. Defendant did not mention his hand during his first police interview, but rather only in his second interview.

At defendant's request, the jury was instructed on voluntary manslaughter. The jury convicted defendant of first-degree premeditated murder. And defendant now appeals.

II. VENUE

Defendant first asserts that the trial court denied him due process and a fair trial by refusing to consider, and by failing to grant, his motion to change venue. We conclude that defendant waived review of his motion to change venue, and even if not waived, defendant's venue argument lacks merit.

The record shows that defendant moved for a change of venue before trial, asserting that pretrial publicity would prevent him from receiving a fair trial. However, at a pretrial hearing on May 5, 2019, defense counsel acknowledged that voir dire was appropriate before the venue motion was argued or decided. Consistent with defense counsel's statements, the trial court issued a written opinion, stating that it would withhold a ruling on venue until voir dire. Voir dire commenced with questioning by the attorneys and specific questions regarding pretrial publicity. At no point did defendant renew his motion to change venue. To the contrary, following jury selection, defense counsel expressed satisfaction with the chosen panel. By acknowledging that voir dire was appropriate before the motion to change venue could be decided, by failing to renew the motion to change venue during or after voir dire, and by instead expressing satisfaction with the jury selected, defendant waived review of his motion to change venue. See *People v Clark*, 243 Mich App 424, 425-426; 622 NW2d 344 (2000); see also *People v Adams*, 245 Mich App 226, 240; 627 NW2d 623 (2001).

Even if not waived, defendant's juror partiality argument lacks merit. "The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial indifferent jurors." *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997). "[T]he existence of pretrial publicity, standing alone, does not necessitate a change of venue." *People v Cline*, 276 Mich App 634, 639; 741 NW2d 563 (2007) (quotation marks and citation omitted). "Whether a defendant's conviction will be reversed depends on whether, under the totality of circumstances, the defendant's trial was not fundamentally fair and held before a panel of impartial, indifferent jurors." *Id*. at 638 (quotation marks and citation omitted).

Considering the totality of the circumstances in this case, defendant has not shown that he was denied an impartial jury. Defendant offers only conclusory statements about publicity, asserting that there was "shocking and polarizing" news coverage in print, on television, on the Internet, and on social media. He discusses no specific articles or posts—and he offers no

meaningful analysis of the amount, geographic scope, or tenor of any publications—to establish that the public was saturated by "a barrage of inflammatory publicity" or that coverage involved "highly inflammatory attention to sensational details." See *Jendrzejewski*, 455 Mich at 502-508. Defendant also does not challenge the manner in which voir dire was conducted. Jurors were questioned about their knowledge of the case and were specifically asked about publicity. Defendant does not explain how these procedures were inadequate to discover bias and prejudice in this case. See *id*. at 509-510. Finally, there is no evidence that anyone on the venire actually was exposed to pretrial publicity about defendant's case. Prospective jurors were asked if they recalled media coverage about the case, and no one answered affirmatively.[2] Defendant has not even attempted a statistical analysis of the jury venire in an attempt to indirectly establish that the chosen panel was unconsciously biased, but on this record, it seems unlikely that such an analysis could support his claim. See *id*. at 511-514. Considering the totality of the circumstances, defendant was not denied an impartial jury or a fundamentally fair trial, and he is not entitled to relief. See *id*. at 520; *Cline*, 276 Mich App at 638-639.

III. OTHER ACTS OF DOMESTIC VIOLENCE

Next, defendant contends that he was denied a fair trial by the admission of other-acts evidence establishing that defendant had a sexual relationship with a 15-year-old ex-girlfriend and forced her to have sex in front of children and family members. According to defendant, the evidence was irrelevant, unfairly prejudicial, and inadmissible under MRE 404(b).

Defendant generally preserved his argument by opposing the admission of other-acts evidence before trial. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, defendant did not specifically oppose the introduction of the evidence on the basis that evidence relating to his former girlfriend was unfairly prejudicial given her age at the time of the sexual assaults. This portion of defendant's argument is, therefore, unpreserved. See *id*. We review a trial court's admission of other-acts evidence for an abuse of discretion. *People v Kelly*, 317 Mich App 637, 643; 895 NW2d 230 (2016). Preliminary questions of law relating to the admission of evidence, such as whether a rule of evidence precludes admission, are reviewed de novo. *Id*. To the extent defendant's claim is unpreserved, unpreserved claims of evidentiary error are reviewed for plain error. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Although defendant relies on MRE 404(b) on appeal, the prosecutor introduced the other-acts evidence under MCL 768.27b(1), which in relevant part states: "in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE 403]." Unlike MRE 404(b), which precludes the admission of evidence solely for propensity purposes, MCL 768.27b allows for the introduction of evidence of domestic violence to establish a defendant's propensity or character to commit acts of domestic violence. *People v Railer*, 288 Mich App 213,

[2] During voir dire, one perspective juror thought that she recalled the case, *not* from any pretrial publicity about the crime but from speaking with her "mom's friend" who lived in the apartment building where the crime occurred. However, further questioning made clear that she was familiar with a different crime involving a shooting. In any event, she was not seated on the final jury.

219-220; 792 NW2d 776 (2010). In other words, "[other]-acts evidence of domestic violence can be admitted at trial because a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed." *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011) (quotation marks and citation omitted; alterations in *Cameron*).

Defendant was charged with the murder of his girlfriend with whom he lived. Thus, he was charged with an act causing physical harm to a person with whom he lived and had a dating relationship; this constitutes an offense involving domestic violence. See MCL 768.27b(6)(a)(*i*), (b)(*ii*), (b)(*iv*). In this context, the prosecutor introduced other-acts evidence relating to domestic violence perpetrated on the victim, including incidents during which (1) defendant beat LMB and hit her head against a bathtub in a motel; (2) defendant burned off LMB's eyelashes with a lighter; (3) defendant punched LMB in the face, threw her phone out of the car window, and burned her with a cigarette; (4) defendant slapped LMB and pulled out her hair weave; and (5) defendant beat and stabbed LMB, prompting her to jump out a window to escape. The prosecutor also offered evidence of domestic violence involving JB, one of defendant's former girlfriends and the mother of his child. JB testified about incidents during which (1) defendant beat her and threw her in the street; (2) defendant chased her vehicle with his vehicle and drove her off the road; and (3) defendant put her in a trunk, beat her with a vase, and knocked out her teeth.

In addition, relevant to defendant's arguments on appeal, JB testified that there were times during their relationship when defendant forced her to perform sexual acts, including an incident when he made her have sex with him in front of her children and another time when family members were present while he sexually assaulted her. These acts involving forced sexual activity are the only other-acts evidence that defendant challenges on appeal. Defendant contends that the acts of sexual assault against JB were irrelevant and inadmissible propensity evidence, and that they were unfairly prejudicial because JB was a minor when he forced her to engage in sexual activity.

Again, the acts were introduced pursuant to MCL 768.27b, under which prior acts of domestic violence demonstrating a propensity to commit acts of domestic violence are relevant. See *Railer*, 288 Mich App at 219-220. Further, under MCL 768.27b(6)(a)(*iii*), an act of "domestic violence" includes causing an individual with whom a defendant has a dating relationship to "engage in involuntary sexual activity by force, threat of force, or duress." Defendant's act of forcing his girlfriend to engage in sexual activity constitutes domestic violence, and particularly when considered with the other instances of past domestic violence, this act provides a full and complete picture of defendant's history and establishes defendant's propensity to commit domestic violence against women with whom he has a dating relationship. See *Cameron*, 291 Mich App at 610; *Railer*, 288 Mich App at 219-220. This evidence was, therefore, relevant and admissible under MCL 768.27b, subject to MRE 403.

Under MRE 403, the probative value of this evidence was not outweighed by the danger of unfair prejudice. In this context, the propensity value of the evidence weighs in favor of its admission. See *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012) (applying MRE 403 in the context of a sister statute, MCL 768.27a). Although prejudicial, the evidence relating to the forced sexual activity was extremely brief and not nearly as graphic as the evidence relating to LMB's death or defendant's other numerous acts of domestic violence against LMB and JB. See *Railer*, 288 Mich App at 220. We are not persuaded that, in light of the other allegations against

defendant and acts described, cursory references to JB's age were likely to incite such "passion as to divert the jury from rational consideration" of defendant's guilt or innocence of the charges. See *Cameron*, 291 Mich App at 611-612. Indeed, the prosecutor made no attempt to emphasize JB's age at trial, and the trial court minimized the prejudicial effect of the other-acts evidence by instructing the jurors that they could not convict defendant because they believed him to be guilty of other bad conduct. See *id*. at 612. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). We are unable to find that the probative value of evidence establishing defendant's propensity to commit domestic violence was outweighed by the danger of unfair prejudice. MRE 403. Consequently, defendant has not shown that the trial court erred by admitting evidence that defendant committed other-acts of domestic violence against JB, including forcing her to engage in sexual activity.

Even if it had been error to admit the evidence that defendant forced JB to have sex while JB was a minor, any such error was not outcome-determinative. See *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); *Coy*, 258 Mich App at 12. There was considerable evidence that defendant stabbed the victim repeatedly with a knife in their apartment and that he then washed her body and transported her to his cousin's home, where he left her body in a Ford Flex before fleeing the state. Defendant's contrasting version of events—that LMB was stabbed by intruders and that she was "okay" and alive in the Ford Flex—lacks any evidentiary support. Defendant's version was disproved by the evidence at trial, including the bloody body imprint on the floor of the bathroom, expert testimony indicating that LMB was dead when placed in the vehicle, defendant's admissions during phone calls to his cousin, defendant's efforts to clean blood in the apartment, and defendant's flight evincing a consciousness of guilt.[3]

Moreover, on appeal, defendant only challenges the other-acts evidence involving forced sex between defendant and JB; he does not challenge the admission of the other numerous acts of domestic violence he perpetrated against LMB and JB, which clearly demonstrated his propensity to commit domestic violence and further bolstered the conclusion that LMB's death was the result of yet another instance of domestic violence perpetrated by defendant on LMB. Cf. *People v Rosa*, 322 Mich App 726, 738; 913 NW2d 392 (2018) (concluding that error in admitting other-acts evidence was harmless because exclusion of this evidence "would not have spared defendant from the devastating propensity evidence that was properly admitted" under MCL 768.27b). Given the considerable evidence of defendant's guilt, any error in the admission of evidence about forced sex between defendant and JB did not affect the outcome of proceedings, so defendant is not entitled to relief on appeal. See *Burns*, 494 Mich at 110; *Coy*, 258 Mich App at 12.

IV. SUFFICIENCY

In his appellate brief, defendant argues that the prosecutor presented insufficient evidence to support his conviction. For purposes of resolving this issue, defendant does *not* challenge the sufficiency of the evidence that he stabbed the victim to death. Rather, he challenges only whether there was sufficient evidence of premeditation and deliberation. Defendant contends that the

[3] Indeed, defendant's flight sharply contrasted with his desire to be with RC, and he seemingly missed their baby's birth as a result.

evidence shows instead that any such killing occurred in the heat of the moment. In his Standard 4 brief, defendant also argues that there was insufficient evidence to support his conviction because all of the evidence in support consisted of perjured testimony. In his Standard 4 brief, defendant does not specifically challenge any particular element of first-degree premeditated murder, but rather characterizes his argument as a due process claim. We disagree with both arguments.

We review de novo a challenge to the sufficiency of the evidence. *People v Mitchell*, 301 Mich App 282, 289-290; 835 NW2d 615 (2013).

> When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. All conflicts in the evidence must be resolved in favor of the prosecution. [*People v Williams*, 268 Mich App 416, 419; 707 NW2d 62 (2005) (citations omitted).]

This Court generally reviews due process claims de novo. *People v Diambro*, 318 Mich App 204, 212; 897 NW2d 233 (2016).

"The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (citation omitted). "Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). There is no minimum time required, but "the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look." *Plummer*, 229 Mich App at 300 (quotation marks and citation omitted). Premeditation and deliberation may be inferred from all the facts and circumstances and established with circumstantial evidence and reasonable inferences drawn therefrom. *Unger*, 278 Mich App at 229; *Plummer*, 229 Mich App at 301. Facts relevant to establishing premeditation includes evidence of "(1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide." *Unger*, 278 Mich App at 229.

A. APPELLATE BRIEF

Viewing the evidence in a light most favorable to the prosecutor, there was sufficient evidence of premeditation and deliberation to support defendant's convictions for first-degree murder.

The relationship between defendant and the victim, and the events leading up to the killing, provide evidence of a "preconceived motive." See *People v Taylor*, 275 Mich App 177, 180; 737

NW2d 790 (2007). Defendant and LMB had a tumultuous relationship, marked by numerous acts of violence by defendant. About the time of LMB's death, defendant was also in a relationship with RC, with whom defendant was expecting a baby. As discussed, defendant made threats of death toward LMB. These prior threats and expressions of ill-will toward LMB are indicia of premeditation. See *People v Lewis*, 95 Mich App 513, 515; 291 NW2d 100 (1980). Indeed, from defendant's relationship with RC and his text messages to LMB on the day before her death, the jury could reasonably infer that defendant had a preconceived motive for the killing.

The circumstances of the killing show that defendant had time to "take a second look." Most notably, police found three knives with blood on them at the crime scene. Two of the knives were broken, and the knives—or pieces of the knives—were found in different locations in the apartment: the kitchen, the bedroom, and the living room. Further, there was blood throughout the apartment—in the kitchen, living room, bedroom, and bathroom. LMB was stabbed multiple times, in her head and stomach; she also had defensive wounds to her hands and wrists. Moreover, the medical examiner testified that LMB's numerous injuries—with the possible exception of abrasions to her chin and foot—were inflicted while she was still alive. Among LMB's wounds were incise wounds to her head, and the medical examiner explained that it is difficult to stab through the skull and that a knife could break when trying to penetrate the skull.

The evidence at the crime scene, including the blood and multiple broken knives, and LMB's wounds indicate an extended and violent struggle between LMB and defendant that took place in multiple locations throughout the apartment. The necessary duration of the struggle would have afforded defendant an opportunity to take a second look between his initial homicidal intent and the ultimate killing. Cf. *People v Oros*, 502 Mich 229, 248; 917 NW2d 559 (2018). The use of three knives, and the fact that defendant broke two of the knives, is particularly compelling evidence of premeditation and deliberation. The trier of fact could reasonably infer that defendant had the time to retrieve two replacement knives after breaking two of them, during which he had time to reconsider what he was doing. Cf. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995) ("[T]he evidence establishes that two separate weapons, a brush and a broom handle, were used to beat the victim, giving defendant the time to take a second look and reconsider his decision."). Considered in conjunction with the other evidence, the fact that defendant inflicted multiple wounds further supports the conclusion that defendant had time to take a second look. See *Unger*, 278 Mich App at 231. Overall, this series of separate and distinct acts of violence—with time in between for defendant to reflect while twice retrieving a new weapon—allowed defendant time to take a second look and supported the conclusion that defendant acted with premeditation and deliberation. Cf. *Oros*, 502 Mich at 247-248; *People v DeRuyscher*, 29 Mich App 515, 517-518; 185 NW2d 561 (1971).

The evidence further shows that after the killing, defendant (1) tried to conceal evidence by washing LMB's body, cleaning the bathroom and transporting LMB's body to another jurisdiction; (2) concocted an unsupported story about intruders to the apartment; and (3) fled the state, leaving his new girlfriend and baby. These acts provide evidence of a consciousness of guilt that would allow the jury to conclude that defendant had a guilty state of mind and that he acted with premeditation. See *Unger*, 278 Mich App at 226-227; *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003); *Haywood*, 209 Mich App at 230. The jury was instructed on voluntary manslaughter, so the jury had the option of accepting that defendant killed LMB on impulse and

in the heat of passion after learning that she slept with someone else. The jury had ample evidence from which to find that defendant premeditated and deliberated the killing.[4]

B. STANDARD 4 BRIEF

In his Standard 4 brief, defendant largely asserts that various witnesses committed perjury, mostly on the apparent ground that they provided testimony that was either internally inconsistent or inconsistent with other witnesses.

Defendant contends that Patton gave inconsistent statements stating three different motives for why defendant killed LMB, and she "should have been impeached at trial" with a difference between her testimony at trial and her testimony at the preliminary examination.[5] However, at trial, defense counsel vigorously cross-examined Patton regarding discrepancies between her trial testimony and her preliminary examination testimony. Defendant contends that another witness lied about one of the instances of domestic violence defendant perpetrated against the victim: the witness testified that she and LMB ran to the witnesses home afterwards, and the witness then took LMB to the hospital. In contrast, a police officer who responded to what appears to have been the same incident testified that according to his report, LMB was transported to the hospital by EMS. Defendant contends that the witness should have been impeached, but this discrepancy is not so obvious: the officer testified that he ordered EMS to report to LMB's location, so EMS "would have" taken her to the hospital; the witness testified that EMS was *supposed* to have taken LMB to the hospital but did not because they took too long. Furthermore, defense counsel elicited from the witness that she had been convicted of a crime involving dishonesty.

In effect, what defendant frames as perjury is nothing more than a question of conflicts in the evidence and issues of witness credibility for the jury to decide. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). All of defendant's asserted challenges to the witnesses' credibilities and inconsistencies were placed before the jury and vigorously explored by defense counsel. The jury could certainly have chosen to deem those witnesses not credible and thus reject their testimonies; however, whether to believe or disbelieve a witness is the sole responsibility of the jury, with which we generally may not tamper. See *Unger*, 278 Mich App at 228-229.

Defendant also argues that there were flaws in the police investigation. Defendant contends that he was never in certain locations where the prosecution stated he was on the basis of a cellphone. He provides no supporting evidence for this contention. Defendant argues that the police improperly allowed a woman who had a key to defendant's apartment to remove her

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[4] On appeal, defendant also asserts that defense counsel provided ineffective assistance by failing to file a motion for a directed verdict. However, because the prosecutor presented sufficient evidence in its case-in-chief to support defendant's conviction for first-degree murder, defense counsel did not provide ineffective assistance by failing to make a futile motion for a directed verdict. See *People v Riley*, 468 Mich 135, 141-142; 659 NW2d 611 (2003).

[5] Defendant does not provide specific citations to pages in the transcript, which we could deem forfeiture of his argument, but we choose to overlook this omission.

belongings, even though defendant contends that she never lived there. The witness's belongings apparently consisted of bagged clothing in an otherwise-empty argument, and defendant provides no explanation for how this alleged investigatory flaw harmed him or deprived him of exculpatory evidence. The prosecutor and police were under no obligation to conduct an exhaustive search for evidence to aid defendant's case or to run every scientific test possible. See *Coy*, 258 Mich App at 21. "[T]he prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with defendant's innocence." *Id.* Although parties *in propria persona* are entitled to generosity and lenity in construing their pleadings, they must still support their arguments. *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976).

Viewing the evidence in a light most favorable to the prosecutor, and making credibility choices in support of the jury verdict, the evidence was sufficient to support defendant's first-degree murder conviction. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant next argues that defense counsel provided ineffective assistance by failing to investigate potential evidence and cross-examine witnesses. We disagree.

"Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016). "Generally, a trial court's findings of fact, if any, are reviewed for clear error, and questions of law are reviewed de novo." *Id.* at 188. When an evidentiary hearing has not been held, this Court's review is limited to mistakes apparent from the lower court record. *Id.* "To establish ineffective assistance of counsel, defendant must show (1) that defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's errors, a different outcome would have resulted." *People v Jackson*, 292 Mich App 583, 600-601; 808 NW2d 541 (2011). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise." *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015). Defendant's burden also includes establishing the factual predicate of his claim. *Id.*

On appeal, defendant contends that defense counsel provided ineffective assistance (1) by failing to investigate and present favorable GPS evidence relating to the Yukon, (2) by failing to investigate and present favorable cell phone records involving a T-Mobile phone, (3) by failing to effectively cross-examine witnesses with "all" inconsistencies between their testimony and their prior statements or police reports, and, apparently, (4) failing to follow up on defendant's claimed injury to his hand.

Defendant's ineffective assistance argument lacks merit. Decisions regarding what evidence to present and how to question witnesses are presumed to be matters of trial strategy, and defendant has not overcome the presumption that counsel provided ineffective assistance. See *Putman*, 309 Mich App at 248. First, defendant has not explained the GPS or cell phone evidence he claims defense counsel should have investigated and presented at trial. Absent support that such evidence exists and would be favorable to the defense, defendant has not established the factual predicate of his claim and there is no basis for concluding that defense counsel performed

unreasonably by failing to pursue this evidence or that its admission would have altered the outcome of proceedings. See *id*. at 248-249. Second, despite defense counsel's thorough cross-examination of witnesses at trial, defendant contends that defense counsel failed to effectively cross-examine and impeach witnesses with "all" inconsistences. However, how to question witnesses is presumed to be a matter of trial strategy, and we see nothing unreasonable in counsel's cross-examination strategy. See *id*. Indeed, defendant has not identified any specific questions counsel should have asked or explained how additional questioning would have affected the outcome. See *id*. at 248-250. On this record, defendant has not shown that counsel's performance fell below an objective level of reasonableness or that counsel's alleged errors affected the outcome of the proceedings. See *Jackson*, 292 Mich App at 600-601. As noted, although defendant provides some evidence that he complained about his hand while in jail, there is no evidence that there was ever *actually* anything wrong with his hand. Defense counsel need not pursue obviously meritless strategies. *Putman*, 309 Mich App at 245. Accordingly, defendant has not established that he was denied the effective assistance of counsel.[6] See *Jackson*, 292 Mich App at 600-601.

VI. *BRADY* VIOLATION

In his Standard 4 brief, defendant also argues that he was denied due process by the suppression of evidence and the prosecutor's failure to correct false testimony. We disagree.

Under *Brady*,[7] "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *People v Chenault*, 495 Mich 142, 149; 845 NW2d 731 (2014) (quotation marks and citation omitted). Defendant asserts that the prosecutor and trial court violated *Brady* when the prosecutor objected on hearsay grounds—and the trial court sustained the prosecutor's objection—to the admission of a recorded statement given by Patton to police. Contrary to defendant's framing of the issue, the exclusion of the evidence on hearsay grounds does not involve a *Brady* violation because it is clear from the record that the defense had the interview in question in its possession. See *Chenault*, 495 Mich at 152 n 4 & 155 n 7. In short, defendant's *Brady* claim lacks merit because the prosecutor did not suppress the recording of Patton's interview.

On appeal, in asserting that a *Brady* violation occurred, defendant also makes a passing reference to a prosecutor's obligation to correct false testimony. Defendant does not develop any argument regarding false testimony, so this issue may be deemed abandoned. See *People v Henry*, 315 Mich App 130, 149; 889 NW2d 1 (2016). Even if the issue is considered, defendant has not shown a due-process violation involving the use of false testimony. The prosecution has an

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[6] On appeal, defendant requests a remand for an evidentiary hearing for additional factual development. However, defendant makes this request in a Standard 4 brief rather than filing a proper motion to remand under MCR 7.211(C)(1). For this reason alone, defendant's request may be denied. See *Bass*, 317 Mich App at 276 n 12. Additionally, we note that defendant's request lacks merit because he fails to identify the issues warranting an evidentiary hearing or to provide an offer of proof regarding the facts to be developed. See MCR 7.211(C). His request is denied.

[7] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

affirmative duty to correct false testimony. *People v Smith*, 498 Mich 466, 476; 870 NW2d 299 (2015). However, as discussed above, what defendant characterizes as perjury in this case involves nothing more than inconsistencies and conflicts in the evidence that were a proper subject for cross-examination and consideration by the jury, not conclusive evidence that the testimony was false. See *People v Bass*, 317 Mich App 241, 275; 893 NW2d 140, 162 (2016); *Parker*, 230 Mich App at 690. In sum, defendant's due-process arguments involving the suppression of evidence or presentation of false testimony lack merit.

VII. CHAIN OF CUSTODY

Finally, in this Standard 4 brief, defendant argues that he was denied due process by the presentation of DNA evidence relating to a swab collected from the victim's back because the prosecutor failed to establish who collected the sample and when and where it was collected. Defendant's argument—made without any citation to legal authority or the lower court record—may be considered abandoned. See *Henry*, 315 Mich App at 149. Even if considered, defendant's argument lacks merit.

Relevant to defendant's argument, a DNA analyst, Amanda Fazi, testified that she received a sample labeled as a swab from a scratch on the victim's back. Fazi did not know who collected the sample, but Fazi analyzed the sample and found a mixture of DNA from three individuals, one of whom was the victim. Fazi determined that it was 71 million times more likely one of the two other contributors was defendant than another unknown person. The medical examiner, Dr. David Moons testified that, as part of the autopsy, he conducted a rape kit that involved collecting swabs from the victim's body. Dr. Moons did not, however, recall collecting a sample from the victim's back. Because there was no testimony about the collection of the swab from the victim's back, defendant now asserts that DNA results relating to the scratch should not have been admitted.

Essentially, defendant challenges the chain of custody and the foundation for the admission of DNA evidence relating to the swab from the victim's back. However, although defendant complains about the admission of this evidence on appeal, we note that defense counsel initially elicited the testimony about the DNA results relating to the back swab during cross-examination, and it was only after defense counsel elicited this testimony that the prosecutor elicited the same testimony on redirect. During closing arguments defense counsel then used the evidence of a third person's DNA to support the assertion that police failed to investigate the possibility that there was someone else in the apartment. In other words, defense counsel made reasonable strategic use of the DNA evidence, even if the strategy ultimately did not work. Defendant cannot complain of error on appeal when his own attorney contributed to the error. See *People v Beckley*, 434 Mich 691, 731; 456 NW2d 391 (1990).

In any event, defendant's argument is, at best, unpreserved, and he cannot show plain error. See *Coy*, 258 Mich App at 12. Although the chain of custody was imperfect, the swab contained a mixture of DNA that included the victim's DNA, reasonably supporting the assertion that the swab was collected from the victim's body as noted on the sample. See *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). Indeed, at trial, although it was unclear *who* collected the sample, there was no dispute that the swab came from the victim, and there has been no allegation—or evidence—of tampering or misidentification. See *People v Herndon*, 246 Mich App 371, 405; 633 NW2d 376 (2001). On these facts, any weaknesses in the chain of custody—

which defense counsel highlighted during closing—went to the weight of the evidence, not its admissibility. See *White*, 208 Mich App at 133. Further, defendant cannot establish outcome-determinative error when evidence of a third contributor's DNA in the swab from the victim's back was arguably beneficial to the defense theory that there was someone else in the apartment. See *People v Dixon-Bey*, 321 Mich App 490, 511; 909 NW2d 458 (2017). On this record, defendant is not entitled to relief on appeal.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause