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STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURRAY, C.J., AND CAVANAGH and SWARTZLE, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KEMO KNICOMBI PARKS

Defendant-Appellant.
/

Supreme Court
No. 162086

Court of Appeals
No. 346587

Circuit Court
No. 17-040829-FC

PLAINTIFF-APPELLEE'S APPENDIX

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEQUAVION DELMARCO HARRIS,

Defendant-Appellant.

UNPUBLISHED
August 13, 2020

No. 346586
Genesee Circuit Court
LC No. 17-040823-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEMO KNICOMBI PARKS,

Defendant-Appellant.

No. 346587
Genesee Circuit Court
LC No. 17-040829-FC

Before: MURRAY, C.J., and CAVANAGH and SWARTZLE, JJ.

PER CURIAM.

These are consolidated cases.[1] Defendants were tried jointly before separate juries for shooting and killing a man in the parking lot of a convenience store. In Docket No. 346586, the jury found defendant Dequavion Delmarco Harris guilty of first-degree premeditated murder, MCL 750.316(1)(a), carrying a concealed pistol, MCL 750.227(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In Docket No. 346587, the jury found defendant Kemo Knicombi Parks guilty of first-degree premeditated murder, carrying a concealed pistol, and felony-firearm. The trial court sentenced both defendants to serve terms

[1] *People v Harris*, unpublished order of the Court of Appeals, entered March 31, 2020 (Docket Nos. 346586; 346587).

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of life in prison without the possibility of parole for their first-degree-murder convictions, two to six years in prison for their concealed-weapon convictions, and two consecutive years in prison for their felony-firearm convictions. Both defendants appeal by right and advance a myriad of challenges. We remand in Docket No. 346587 for the sole purpose of redetermining a portion of Parks's restitution order. In all other respects, we affirm.

I. BACKGROUND

On October 5, 2016, the victim, often referred to by his nickname "Kee-Kee," was shot and killed in the parking lot of a convenience store. The victim was in his red truck, parked in a parking space, while his friend went inside a store referred to as the "Kingwater Market." Harris, Parks, and several others arrived at the store in a car and parked next to the victim's truck. The driver of the vehicle containing Harris and Parks, Deantanea Ratcliff, testified that Harris specifically told her to go to the store where the shooting occurred, instead of a closer store. Harris and Parks were seated in the backseat of Ratcliff's vehicle, and they remained in the car while another occupant, Malik Fordham, went into the store.

Ratcliff testified that Harris and Parks spoke to each other in low voices and whispers, and that she saw Parks pass a gun to Harris. At this point, Harris and Parks left the car and, while doing so, Harris told Ratcliff, "[W]hen we get out pull off." Ratcliff left the parking lot of the Kingwater Market, with Laniya Sublett in the front-passenger seat, and drove to a nearby parking lot to wait and see whether Harris, Parks, and Fordham needed a ride home.

Witnesses saw Parks enter the store. A store employee, Danny Gordon, saw Harris briefly enter the store wearing a mask, look around, and then return to the parking lot. Several witnesses in the store heard gunshots coming from the parking lot, and both Ratcliff and Sublett heard these gunshots as well. Sublett testified that, from her position in the nearby parking lot, she saw Harris with his arm up and extended toward the red truck as gunshots rang out. Another witness, Charles Weston, saw a person wearing a mask with his arm up and extended toward the truck as he heard the gunshots ring out. One of the police detectives testified that the ammunition recovered from the parking lot was .25 caliber and that this fit a very small type of handgun that can fit in the palm of one's hand.

Sublett and Ratcliff both saw Harris run away from the parking lot and across the street, after they heard the gunshots. Sublett testified further that she then saw the red truck flee the parking lot and crash into a tree off the main road. Police and other emergency responders arrived at the scene and transported the victim to the hospital, but he was pronounced dead on arrival, having suffered five gunshot wounds.

After the shooting, police recovered several text messages exchanged between Harris's phone and a phone belonging to Makala Blair. On the morning of the shooting, Harris texted Blair and asked her to bring him ammunition, and further text messages indicated that Blair did so. Shortly after the shooting occurred, Blair asked Harris about the shooting, and Harris told Blair to "see if Kee-Kee straight." At trial, Blair testified about a feud between Harris and the victim and suggested that the murder had probably been in retaliation for the prior murder of Harris's cousin, Dominique Fuller.

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After he was incarcerated, police found rap lyrics in Harris's jail cell. Deputy Mark Wing testified that he found the lyrics in a box that was near Harris's bed, and Harris identified the box as belonging to him. The trial court allowed the prosecutor to admit these lyrics into evidence.

At trial, the prosecutor's theory was that Harris and Parks planned to murder the victim in retaliation for the prior murder of Harris's cousin, Fuller, because the victim in this case was suspected of being involved in Fuller's murder. The prosecutor did not allege that Parks shot the victim, but charged him with first-degree-premeditated murder based on a theory of aiding and abetting Harris.

The jury convicted defendants on all counts. These appeals followed.

II. ANALYSIS

A. DOCKET NO. 346586

In Docket No. 346586, Harris argues that the evidence presented at trial was insufficient for a jury to find the element of premeditation necessary to support his conviction of first-degree premeditated murder. He further contends that the trial court abused its discretion when it admitted into evidence lyrics found in his jail cell, and argues that the erroneously admitted evidence improperly prejudiced the jury against him. We address each argument in turn.

1. SUFFICIENCY OF THE EVIDENCE

This Court reviews de novo a claim that the evidence was insufficient to support a criminal conviction. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). This Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could have found all the elements of the offense proved beyond a reasonable doubt. *Id.* The elements of the offense may be proven by circumstantial evidence and reasonable inferences therefrom. *Id.* Although inferences may not be based upon mere speculation, *People v Lane*, 308 Mich App 38, 59; 862 NW2d 446 (2014), "this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict," *Solmonson*, 261 Mich App at 661. Finally, all factual conflicts must be viewed in a light favorable to the prosecutor. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The offense of first-degree murder is described in MCL 750.316, which provides in relevant part:

> (1) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:
>
> (a) Murder perpetrated by means of poison, lying in wait, or *any other willful, deliberate, and premeditated killing*. [Emphasis added.]

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The terms "willful," "deliberate," and "premeditated" are not defined within the statute. Michigan appellate courts have "recognized the ordinary meaning of the distinct and separate terms as the following: 'to premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.' " *People v Oros*, 502 Mich 229, 240; 917 NW2d 559 (2018) (cleaned up). Our Supreme Court explained that, although

> the statute may be clear on its face that premeditation and deliberation are separate elements, a rigid and mechanical application is often difficult because the same facts may tend to establish each element, and they are subjective factors usually incapable of direct proof absent an admission or confession by the defendant. [*Id.* at 240-241.]

" 'The real focus of first-degree murder jurisprudence in Michigan has been on the kind of evidence which permits an inference of premeditation and deliberation,' and that inference may be established 'from *all* the facts of the case.' " *Id.* at 242 (citation omitted).

"Premeditation and deliberation may be established by an interval of time between the initial homicidal thought and ultimate action, which would allow a reasonable person time to subject the nature of his or her action to a 'second look.' " *Id.* (citations omitted). "[S]ome time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." *Id.* (cleaned up). There is no minimum time limit required; premeditation and deliberation require only a "brief moment of thought" or a "matter of seconds." *Id.* at 242-243 (cleaned up). The jury may infer that a reasonable person had time for a "second look" from the entirety of the case's facts and circumstances. *Id.* at 243-244.

Viewing the entirety of the evidence presented at trial, we conclude that it amply supported the jury's finding of premeditation and deliberation on the part of Harris. Witness testimony placed Harris at the store at the time of the shooting. Earlier that day, Harris texted Blair to ask that she bring him ammunition, and she did so. Harris instructed Ratcliff to drive to the store where the shooting occurred, instead of a closer store. When they arrived at the store, Ratcliff parked next to the victim's truck, and she overheard Harris and Parks whispering in the backseat. Ratcliff saw Parks pass a gun to Harris, at which point he and Parks left the car. Harris was seen briefly entering the store wearing a mask before returning to the parking lot. Sublett subsequently saw Harris with his arm up and extended toward the red truck as gunshots rang out. Similarly, Weston saw a person wearing a mask with his arm up and extended toward the truck as shots rang out. One of the police detectives testified that the ammunition recovered from the parking lot was .25 caliber and that this fits a very small type of handgun that can fit in the palm of one's hand. After the shots rang out, Sublett and Ratcliff both saw Harris run away from the parking lot and across the street. Although no witness saw Harris holding a gun, the jury could infer from these circumstances that Harris was the person who shot and killed the victim. Furthermore, the text messages between Harris and Blair indicated that Harris planned the shooting in advance, when he requested that Blair bring him ammunition, and Blair testified about an ongoing feud between Harris and the victim and suggested that the murder had probably been in retaliation for the prior murder of Harris's cousin.

Viewing this evidence in the light most favorable to the prosecutor, a rational jury could conclude that Harris obtained ammunition on the day of the shooting, sought out the victim at the

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store in retaliation for the prior murder, discussed with Parks the victim's murder, and obtained Parks's gun for this purpose. Harris donned a mask, checked inside the store briefly, and went back to the parking lot, at which point he discharged his gun at the victim. Given that a "second look" can require mere seconds of premeditation and deliberation, a rational jury could also have found that Harris and Parks did not know that the victim would be at the store but that, upon seeing him in the red truck, they decided to murder him at that time. Either conclusion would have supported a finding of premeditation and deliberation.

2. ADMISSION OF RAP LYRICS

Harris next argues that the trial court erroneously admitted numerous lyrics from a rap song that he allegedly wrote. Harris challenges the admission of these lyrics into evidence on both authenticity and relevancy grounds. This Court has reviewed all of the lyrics admitted into evidence. While we conclude that some of the lyrics were improperly admitted because of irrelevancy and the danger of unfair prejudice, we ultimately conclude that the error was harmless in light of the other untainted evidence arrayed against Harris.

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). A court abuses its discretion when its decision is "outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). But, when "the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility," we review the question de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Evidence must be authenticated before admission. MRE 901(a). This "condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). One way this may be done is through "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). The proffered evidence "need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility." *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013) (cleaned up).

In the present case, Deputy Wing testified that he found the lyrics in Harris's jail cell. Deputy Wing asked Harris and his cellmate to identify those pieces of property that belonged to each of them. Deputy Wing found the lyrics in a box near Harris's bed, and Harris identified the box as belonging to him. Accordingly, Deputy Wing's testimony sufficiently authenticated the lyrics for admission. See MRE 901(a) and (b)(1). Any further arguments by Harris concerning the author of the lyrics went to the weight of the evidence, not its authenticity.

The fact that evidence has been authenticated does not mean it is necessarily admissible. Only relevant evidence is admissible. MRE 402. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury." MRE 403. "In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *People v*

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Vasher, 449 Mich 494, 501; 537 NW2d 168 (1995). Rather, "[u]nfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). Our Supreme Court has explained:

> The weighing of evidence's probative value against its prejudicial effect requires a balancing of several factors, including the necessary time to present the evidence, whether the evidence is needlessly cumulative, how directly probative the evidence is, how necessary the fact to be proven by the evidence is, whether the evidence would mislead the jury, and whether there is an alternative and less potentially harmful way to prove the fact. [*People v Sharpe*, 502 Mich 313, 331-332; 918 NW2d 504 (2018).]

Furthermore, evidence of a defendant's character is generally inadmissible to prove "action in conformity therewith on a particular occasion." MRE 404(a).

In our review of the challenged lyrics, both individually and when viewed together as a whole, we conclude that some were relevant and not unfairly prejudicial. These particular lyrics were relevant because they tended to show that Harris held a grudge against the person who murdered Fuller; that Harris sought out this person; that Harris murdered the victim in retaliation for Fuller's murder; and that Harris attempted to intimidate witnesses to dissuade them from testifying in court. These were facts "of consequence to the determination of the action" and made it "more probable" that Harris committed the instant murder. See MRE 401. Furthermore, their substantial probative value outweighed any unfairly prejudicial value. It is true that, as Harris's counsel argued, there was the danger of the jury stereotyping Harris because rap lyrics might be associated with gangs, violence, and crime. This risk, however, was outweighed by the specific references made by Harris to tracking down Fuller's murderer, killing him, and intimidating witnesses. These particular lyrics provided substantial probative value, and we do not believe that this value was *substantially* outweighed by the risk of unfair prejudice. See MRE 403.

Other lyrics were, however, irrelevant and unfairly prejudicial. These lyrics did nothing to connect Harris to the victim's murder. The lyrics instead connected Harris to unrelated guns, violence, killings, drug use, high-crime areas, and police investigations. Any marginal probative value from these lyrics was substantially outweighed by the risk of unfair prejudice because it risked misleading the jury into convicting Harris based on his portrayal as a violent person who liked guns, liked killing people, was connected to prior police investigations, and potentially used drugs. In addition to the content of these lyrics, the *way* in which these lyrics were written added to the risk for prejudice. The language used was in many instances vulgar and crass, and such language could only raise the risk that the jury might be misled and inflamed against Harris. The trial court abused its discretion in admitting these other lyrics.

This conclusion does not end our analysis, however, because "[p]reserved nonconstitutional errors are subject to harmless-error review under MCL 769.26." *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). The statute provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the

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> jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26.]

A preserved, nonconstitutional error is not "ground[s] for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *People v Denson*, 500 Mich 385, 409; 902 NW2d 306 (2017) (cleaned up). The focus must be "on the nature of the error," and this Court must assess its effect "in light of the weight and strength of the untainted evidence." *Id.* at 409-410 (cleaned up). The defendant carries "the burden of establishing a miscarriage of justice under a 'more probable than not' standard." *Thorpe*, 504 Mich at 252 (citation omitted).

As previously discussed, there was ample evidence arrayed against Harris for a jury to convict him of premeditated murder, including numerous witnesses who placed him at the scene with his arm raised and pointed at the victim's truck. Witnesses subsequently saw Harris flee the scene, and police recovered various incriminating text messages. There was evidence of a feud between Harris and the victim, and the admissible lyrics described how Harris sought out the victim in retaliation for the murder of his cousin. In light of the strength of the prosecutor's case, we conclude that Harris has not shown that it is "more probable than not" that a miscarriage of justice occurred, *Thorpe*, 504 Mich at 252 (cleaned up), or that the admission of the lyrics was outcome-determinative, *Denson*, 500 Mich at 409.

B. DOCKET NO. 346587

In Docket No. 346587, Parks presents five issues on appeal. He argues that his constitutional rights to a speedy trial and to confront witnesses were violated. He contends that the evidence was insufficient for the jury to convict him of aiding and abetting Harris in the shooting. He challenges as unconstitutional the mandatory nature of his life-without-parole sentence. Finally, he contends that the trial court erroneously included the cost of the victim's truck when calculating restitution. We address each argument in turn.

1. SPEEDY TRIAL

We review de novo whether a defendant has been denied his constitutional right to a speedy trial. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Both the Michigan Constitution and United States Constitution guarantee the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. These rights are also enforced by statute, MCL 768.1, and court rule, MCR 6.004. "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). To determine if a defendant's right to a speedy trial was violated by pretrial delays, Michigan courts apply the four-part balancing test set forth in *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972). *Williams*, 475 Mich at 261-262. These four factors are: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id.* Moreover, a delay of 18 months or more is presumed to be prejudicial, and, at that point, "the burden shifts to the prosecution to show that there was no injury." *Id.* at 262. In other words, "a presumptively prejudicial delay triggers an inquiry into the

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other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Id.* (cleaned up).

Parks was incarcerated for approximately 22 months before trial, and the prosecutor concedes that this delay was presumptively prejudicial. The prosecutor contends, however, and we agree, that the remaining factors do not weigh in Parks's favor. Factor two is the reason for the delay, and our review of the record shows that legitimate reasons for this delay existed, including Parks's own conduct. Parks was bound over in January 2017, and trial was initially set for August 2017. The trial was subsequently adjourned several times, first to October 2017 and then to February 27, 2018. The original judge to whom this case was assigned retired from the bench in December 2017. Apart from perhaps the first adjournment to October 2017, it appears from the record that the judge's retirement contributed to these initial delays. A new judge was not appointed to the bench until February 2018, and, when Parks's case was assigned to the new judge on February 12, 2018, there was a backlog of cases that had resulted from the initial judge's retirement. "Although delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id.* at 263 (cleaned up).

Furthermore, when Parks appeared before the newly-appointed judge on February 22, 2018, the prosecutor informed the trial court that he and Parks's counsel had been attempting to resolve the case and that various "housekeeping" issues were still being addressed. Parks did not dispute this. This suggests that, even if the prior judge had not retired, trial may have been delayed because of ongoing negotiations between Parks and the prosecutor. Trial was set for April 2018, but it was again delayed to June 2018, at which point Parks filed a motion for bond and speedy trial.[2] At the hearing, however, Parks's counsel stated that there had been ongoing negotiations between himself and the prosecutor attempting to resolve the case. Moreover, Parks's counsel stated that he and the prosecutor would be "continuing our discussions" to "see if we can't resolve this." Again, this suggests that Parks and the prosecutor were actively negotiating and attempting to resolve the case, which would explain why the trial was delayed. Although Parks asserts on appeal that he was not the cause of the delay, his counsel's remarks on the record suggest otherwise. This factor weighs against Parks.

Factor three is the defendant's assertion of the right. Parks failed to advance any speedy-trial argument until late March 2018—14 months after his arrest and incarceration awaiting trial. Before that date, the record is replete with delays and adjournments; yet, there are no indications that Parks voiced any concerns over those delays and adjournments. Rather, as previously discussed, it appears that Parks contributed to this delay through his ongoing negotiations with the prosecutor. This factor weighs against Parks.

Finally, factor four is the prejudice to the defendant. There are two types of prejudice a defendant may receive: "prejudice to his person and prejudice to the defense." *Williams*, 475 Mich

[2] Parks had also filed a motion for bond in late March 2018. The trial court denied the motion for bond because of the seriousness of the charges. Moreover, the trial court noted that the trial was set to begin in two weeks.

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at 264 (cleaned up). Our Supreme Court held in *Williams* that, although the "defendant suffered considerable personal deprivation by his 19-month incarceration before trial," including claims of "mental anxiety," the "prejudice prong of the *Barker* test may properly weigh against a defendant incarcerated for an even longer period if his defense is not prejudiced by the delay." *Id.* The more important of the two types of prejudice is prejudice to the defense "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* (cleaned up). Parks contends generally that the length of his pretrial incarceration affected his ability to present evidence in the form of the witnesses who testified at trial. The only concrete example that Parks gives is that of Fordham, who was an unavailable witness at trial. Parks fails to demonstrate how the length of his incarceration led to Fordham's unavailability. Parks merely asserts without support that the delay "most likely" caused Fordham to become unavailable. Yet, we note that Fordham's unavailability was caused by his refusal to appear, even after a bench warrant was issued, and his decision to go "on the run" from law enforcement. We believe it unlikely, therefore, that he would have decided to appear for an earlier-scheduled trial. Furthermore, the prosecutor has shown that Fordham's testimony was innocuous and cumulative, and that his absence at trial did not hurt Parks's defense. Reviewing Fordham's preliminary examination testimony, we agree. Fordham largely testified concerning background matters that other witnesses covered in their testimony. He left the car soon after arriving at the store and, accordingly, provided no insight into whether Parks gave a gun to Harris. Fordham was in the store when the shooting occurred and did not witness it. Parks also fails to show how he was prejudiced by Fordham's absence given that Fordham's preliminary examination testimony was read to the jury.

We conclude that, of the four *Barker* factors, only factor one—the length of the delay—weighs in Parks's favor. The remaining three factors weigh against him. Parks's right to a speedy trial was not violated, and reversal is not warranted.

2. SUFFICIENCY OF THE EVIDENCE

Next, we address Parks's arguments concerning whether the evidence was sufficient for the jury to find that he aided and abetted Harris in committing first-degree-premeditated murder.

Michigan's aiding and abetting statute, MCL 767.39, provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Our Supreme Court has held that, in order for a defendant to be convicted of aiding and abetting, three elements must be proven:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (cleaned up).]

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"Under the natural and probable consequences theory, there can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it." *Id.* at 9 (cleaned up).

Although Parks concedes that Harris shot and killed the victim, he disputes the second and third elements. Regarding the second element, Parks essentially asserts that, because only one witness, Ratcliff, supposedly saw him pass a gun to Harris, this was insufficient evidence in the face of Parks's adamant denials to police. Parks's argument is one of witness credibility and weight of evidence, and "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Regarding the third element, Parks argues that the evidence was insufficient to show that, when he supposedly gave the gun to Harris, he had knowledge that Harris was going to use that gun to murder the victim. Ratcliff, however, testified that Parks and Harris remained in the car and whispered to each other until Parks gave Harris a gun. The two men left the car, and Harris told Ratcliff to drive away as soon as they left the car. Shortly thereafter, Harris fired that gun at the victim, who had been parked next to Ratcliff's car. Additionally, Parks told police in an interview that he had known that the victim was in the parking lot and "knew something was up." Parks further told police that he had known that "somebody thought [the victim] had something to do with killing" Harris's cousin. Parks also gave inconsistent statements to police on various matters. From such evidence, a rational jury could find that Parks and Harris planned the murder of the victim in retaliation for the murder of Harris's cousin and that Parks gave the gun to Harris for this express purpose.

3. CONFRONTATION CLAUSE

Parks next argues that the admission of Fordham's preliminary-examination testimony violated his constitutional right to confront witnesses against him. He also contends that Fordham was improperly declared to be an unavailable witness under MRE 804.

"The Confrontation Clause is 'primarily a functional right' in which the right to confront and cross-examine witnesses is aimed at truth-seeking and promoting reliability in criminal trials." *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012) (citation omitted). "[O]ut-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a *previous opportunity to cross-examine the declarant*." *Id.* at 698 (emphasis added).

We conclude that Parks waived these claims. "[W]aiver is the intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (cleaned up). During trial, the prosecutor informed the trial court that there were issues in obtaining Fordham's appearance for trial. Parks's counsel advanced the possibility of declaring Fordham to be an unavailable witness and using his preliminary-examination testimony. In fact, Parks's counsel stated that he "want[ed] Fordham's testimony" admitted regardless of whether it was in person or through his preliminary examination. When the prosecutor formally moved for Fordham's declaration as an unavailable witness and for his preliminary examination testimony to be admitted, Parks's counsel stated he was "in full agreement." Through such affirmative actions, Parks waived his arguments regarding the Confrontation Clause and MRE 804(b). "A defendant

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may not waive objection to an issue before the trial court and then raise it as an error before this Court. To hold otherwise would allow defendant to harbor error as an appellate parachute." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998) (citation omitted).

4. MANDATORY SENTENCE OF LIFE WITHOUT PAROLE

Parks further contends that his mandatory life without parole sentence for first-degree murder was unconstitutional. This Court reviews constitutional issues de novo. *People v Bosca*, 310 Mich App 1, 56; 871 NW2d 307 (2015).

Parks was 18 years old when he was convicted of first-degree premeditated murder. His arguments are essentially an attack on MCL 750.316, which mandates a sentence of life without parole for adults who commit first-degree murder. See MCL 750.316(1). He contends that mandatory life-without-parole sentences for 18-year-olds violate the Eighth Amendment to the United States Constitution and Article 1, Section 16 of the Michigan Constitution. In support, Parks argues that the principles espoused in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), which held that mandatory life-without-parole sentences for *juvenile* offenders are unconstitutional, should also apply equally to 18-year-olds like Parks.

Both the United States Constitution and Michigan Constitution provide protection against cruel and unusual punishment. US Const, Am VIII ("cruel and unusual punishments"; Const 1963, art 1, § 16 ("cruel or unusual punishment"). "Because of its broader language the Michigan prohibition potentially covers a larger group of punishments." *People v Hallak*, 310 Mich App 555, 569; 873 NW2d 811 (2015), rev'd on other grounds 499 Mich 879 (2016). The United States Supreme Court in *Miller* held that a mandatory sentence of life without parole for *juvenile* offenders was unconstitutional and violated the Eighth Amendment to the United States Constitution. *Miller*, 567 US at 479. The Court permitted a sentence of life without parole for juvenile offenders, but it foreclosed the possibility of this sentence being mandatory. *Id.* at 480. The Court had previously stated that

> [d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. [*Roper v Simmons*, 543 US 551, 574; 125 S Ct 1183; 161 L Ed 2d 1 (2005).[3]]

Miller did nothing to abolish or change this "line" espoused in *Roper*; in fact, *Miller* thoroughly discussed *Roper* and based its own decision on its principles. See, e.g., *Miller*, 567 US at 466-467, 479-480, 483-484. Contrary to Parks's contentions, *Miller* and *Roper* do not support his position. Moreover, our own Supreme Court has expressly held that a mandatory sentence of life

[3] *Roper* abolished the death penalty for juvenile offenders, and it drew the line at 18 years of age. *Roper*, 543 US at 578-579.

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without parole for adult offenders does *not* constitute cruel and unusual punishment or cruel or unusual punishment under the United States and Michigan Constitutions, respectively. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976). This Court must follow *Hall* as binding precedent. See *Beasley*, 239 Mich App at 559.[4]

5. RESTITUTION

Finally, Parks argues that the victim's red truck was improperly included in the trial court's restitution order. Because Parks failed to object to restitution at sentencing, we review this issue for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

MCL 780.766 provides in relevant part:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. . . .
>
> (3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:
>
> * * *
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> (*i*) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> (*ii*) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

[4] We recognize that our Supreme Court may choose to review this issue and provide guidance to the bench and bar, in an appeal currently pending before that Court. See *People v Manning*, unpublished order of the Court of Appeals, entered February 21, 2019 (Docket No. 345268), lv pending.

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* * *

> (7) If the victim is deceased or dies, the court shall order that the restitution or remaining restitution be made to those entitled to inherit from the victim's estate.

Furthermore, MCL 780.767 provides:

> (1) In determining the amount of restitution to order under section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense.
>
> (2) The court may order the probation officer to obtain information pertaining to the amounts of loss described in subsection (1). The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the court directs.
>
> (3) The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matters described in subsection (1).
>
> (4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

"A restitution amount, if contested, must be proven by a preponderance of the evidence." *People v Byard*, 265 Mich App 510, 513; 696 NW2d 783 (2005).

Parks's and Harris's convictions stemmed from the murder of the victim in which Harris used a gun to shoot at the victim while he was seated inside of the red truck. The evidence at trial showed that the victim, after being shot multiple times, attempted to flee the parking lot in his red truck but crashed into a tree. Accordingly, the prosecutor showed by a preponderance of the evidence that the red truck's crash and damage was a direct result of Harris's and Parks's offenses. See MCL 780.766(2). At sentencing, however, the prosecutor informed the trial court that the victim's mother had verbally indicated the value of the truck, and that the prosecutor did not provide formal documentation of this value. On appeal, the prosecutor concedes that the trial court never received documentation of the truck's value, and stipulates to a remand for determination of the amount of restitution for the vehicle. Accordingly, we remand for the limited purpose of determining the truck's proper value.

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III. CONCLUSION

In Docket No. 346586, we affirm. In Docket No. 346587, we remand solely to determine the value of the victim's truck for purposes of the restitution order. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Brock A. Swartzle

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BIOGRAPHICAL INFORMATION



KEMO KNICOMBI PARKS
Image Date: 11/2/2018

MDOC Number:	620011
SID Number:	4209826X
Name:	KEMO KNICOMBI PARKS
Racial Identification:	Black
Gender:	Male
Hair:	Black
Eyes:	Brown
Height:	5' 10"
Weight:	198 lbs.
Date of Birth:	01/16/1998 (24)

MDOC STATUS

Current Status:	Prisoner	Earliest Release Date:	LIFE
Assigned Location:	Ionia Correctional Facility	Maximum Discharge Date:	LIFE
Security Level:	V		

MARKS, SCARS & TATTOOS

Body Piercing- Left Ear

Body Piercing- Right Ear

Tattoo- Chest

Tattoo- Left Arm - "Kemo"

Tattoo- Left Forearm

Tattoo- Left Forearm - A cross

Tattoo- Neck

Tattoo- Right Bicep - "810"

Tattoo- Right Forearm - "Buc 475, K", a face, a skull w/ a crown

Tattoo- Right Hand - A clock, "SELF"

ALIASES

None

PRISON SENTENCES

ACTIVE

Sentence 1

Offense: Homicide - Murder First Degree- Premeditated

Minimum Sentence: LIFE

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MCL#:	750.316A	Maximum Sentence:	LIFE
Court File#:	17040829-FC-B	Date of Offense:	10/05/2016
County:	Genesee	Date of Sentence:	10/28/2016
Conviction Type:	Jury		

Sentence 2

Offense:	Weapons - Felony Firearms	Minimum Sentence:	2 years 0 months 0 days
MCL#:	750.227BA	Maximum Sentence:	2 years 0 months
Court File#:	17040829-FC-B	Date of Offense:	10/05/2016
County:	Genesee	Date of Sentence:	10/28/2016
Conviction Type:	Jury		

INACTIVE

Sentence 1

Offense:	Weapons - Carrying Concealed	Minimum Sentence:	2 years 0 months 0 days
MCL#:	750.227	Maximum Sentence:	5 years 0 months
Court File#:	17040829-FC-B	Date of Offense:	10/05/2016
County:	Genesee	Date of Sentence:	10/28/2016
Conviction Type:	Jury	Discharge Date:	11/03/2021

Discharge Reason:

PROBATION SENTENCES

ACTIVE

None

INACTIVE

None

SUPERVISION CONDITIONS

None

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BIOGRAPHICAL INFORMATION



DEQUAVION DELMARCO HARRIS
Image Date: 11/17/2021

MDOC Number:	520019
SID Number:	
Name:	DEQUAVION DELMARCO HARRIS
Racial Identification:	Black
Gender:	Male
Hair:	Black
Eyes:	Black
Height:	5' 10"
Weight:	150 lbs.
Date of Birth:	02/12/1997 (24)

MDOC STATUS

Current Status:	Prisoner	Earliest Release Date:	LIFE
Assigned Location:	Oaks Correctional Facility	Maximum Discharge Date:	LIFE
Security Level:	IV		

MARKS, SCARS & TATTOOS

Tattoo- Back - "Shaneil"

Tattoo- Chest

Tattoo- Left Arm - clown face, "laugh now, cry later", "97"

Tattoo- Left Finger - "hate"

Tattoo- Left Forearm

Tattoo- Left Hand - day of the dead face

Tattoo- Right Arm - "Blessed", "Quay", "19"

Tattoo- Right Bicep

Tattoo- Right Finger - "love"

Tattoo- Right Hand - flames, "MPR"

ALIASES

QUAY

PRISON SENTENCES

ACTIVE

Sentence 1

19b

Offense:	Homicide - Murder First Degree-Premeditated	Minimum Sentence:	LIFE
MCL#:	750.316A	Maximum Sentence:	LIFE
Court File#:	17040823-FC-B	Date of Offense:	10/05/2018
County:	Genesee	Date of Sentence:	10/29/2018
Conviction Type:	Jury		

Sentence 2

Offense:	Weapons - Felony Firearms	Minimum Sentence:	2 years 0 months 0 days
MCL#:	750.227BA	Maximum Sentence:	2 years 0 months
Court File#:	17040823-FC-B	Date of Offense:	10/05/2018
County:	Genesee	Date of Sentence:	10/29/2018
Conviction Type:	Jury		

INACTIVE

Sentence 1

Offense:	Weapons - Carrying Concealed	Minimum Sentence:	2 years 0 months 0 days
MCL#:	750.227	Maximum Sentence:	5 years 0 months
Court File#:	17040823-FC-B	Date of Offense:	10/05/2018
County:	Genesee	Date of Sentence:	10/29/2018
Conviction Type:	Jury	Discharge Date:	10/28/2021

Discharge Reason:

PROBATION SENTENCES

ACTIVE

None

INACTIVE

None

SUPERVISION CONDITIONS

None

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JOSEPH GELIA,

Defendant-Appellant.

UNPUBLISHED
January 21, 2020

No. 344130
Jackson Circuit Court
LC No. 16-005361-FC

Before: CAMERON, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant forcibly entered a home and discharged a handgun multiple times, while streaming live video of his conduct on social media. One of the bullets shot by defendant struck and killed a woman who was with her young child. Defendant appeals as of right from the jury conviction of first-degree felony murder and other crimes, arguing that he received ineffective assistance of counsel, that his sentence for the conviction of first-degree felony murder constituted cruel and unusual punishment, and that the trial court erred when it admitted into evidence the audio recording of a 911 call and a video that defendant recorded of his own conduct before the shooting. We affirm.

I. BACKGROUND

This case arises from the death of a woman in Jackson, Michigan, in November 2016. On the night in question, defendant was with his girlfriend and his brother's ex-girlfriend, who drove him to a house in Jackson. The driver informed defendant that his brother was staying at the house. Various witnesses testified that defendant's brother was indeed present in the house, where he had been staying with defendant's ex-girlfriend.

Upon arrival, defendant violently forced open the door to the house, wielding a handgun in one hand and his cellphone in the other. Defendant recorded himself breaking into the house and firing his handgun several times. Defendant did not record the entire incident, however, and witness testimony presented at trial indicated that defendant fired his handgun a total of nine times, while nine shell casings were found in the house. Defendant fired four shots into the living-room floor, one shot into a kitchen cupboard, and four shots in the basement. One of

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those shots struck and killed the victim. At trial, defendant did not contest that he forcibly entered the house, that he fired the handgun inside the house, and that he fired the shot that killed the victim.

The homeowner testified that he was upstairs when he heard a knock at the front door. He looked out the window and saw a vehicle he did not recognize. As he headed downstairs, he saw defendant kick in the front door and begin firing a handgun. The homeowner admitted that defendant never spoke to him, looked at him, pointed the handgun at him, or moved toward him. Instead, defendant moved through the living room, firing the handgun. The homeowner retreated upstairs and called 911, and the prosecutor played an audio recording of this 911 call for the jury.

The victim, her child, and her boyfriend were all in the basement when defendant began shooting. The victim's boyfriend testified that defendant pointed a handgun at him while defendant was on the stairs leading to the basement, and that defendant fired twice at him. The victim's boyfriend also described how he ran into a bedroom, slammed the door, called 911, and then heard additional gunshots. He testified that defendant saw him enter the bedroom and close the bedroom door. Although defendant never attempted to enter the bedroom after him, defendant shot twice through the door. Once in the bedroom, the victim's boyfriend called 911. As he did so, he noticed the victim lying on the ground with her eyes open. He noticed blood and began to scream and yell for the victim.

The trial court allowed the prosecutor to play an audio recording of the boyfriend's 911 call for the jury. Before trial, defendant had moved to exclude the recording of this 911 call from evidence, arguing that it was not relevant under MRE 401 and unfairly prejudicial under MRE 403. At the pretrial motion hearing, the trial court rejected defendant's arguments and ruled that the recording was admissible. Accordingly, the trial court allowed the prosecutor to play the 911 call for the jury at trial.

After firing his handgun in the house, defendant fled the scene. Paramedics arrived and transported the victim to the hospital where she was pronounced dead from a gunshot wound. Meanwhile, police stopped and arrested defendant in his vehicle. Defendant was in possession of a handgun on which the serial number had been obliterated. The arresting police officer testified that defendant had alcohol on his breath and that his speech was slurred at the time of his arrest.

Police interviewed defendant and the prosecutor played a recording of the interview for the jury. In that interview, defendant confessed to the shooting. Defendant stated that he was with his girlfriend and his brother's ex-girlfriend on the night of the shooting. He claimed that his brother had threatened to kill him. He stated that, when he arrived at the house in Jackson, he peeked in the window and saw his ex-girlfriend in the living room. Defendant admitted that he had loaded 13 bullets into the handgun, and that he fired shots inside the house, but claimed that he was not aiming at anyone because he just wanted to scare everyone in the house. Defendant stated that he deserved to go to prison for what he had done, and that he planned to flee to Mexico after the shooting. Numerous times during this interview, defendant expressed the desire to kill himself.

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During this interview, defendant also told police that he had consumed marijuana and alcohol, that he was intoxicated, and that he was too drunk to drive his own vehicle. Accordingly, police administered a breathalyzer test to defendant. Although the prosecutor did not admit the results of the breathalyzer test into evidence, the interviewing officer stated that the test revealed a .09 bodily alcohol content, which exceeded the legal limit for driving a motor vehicle. The police officer testified, however, that he thought defendant was not too intoxicated to have a cogent conversation with police during the interview.

The next day, police again interviewed defendant. The prosecutor played a recording of the second interview for the jury. At this second interview, defendant told police that he was drunk and that he had taken Xanax on the day of the shooting. Defendant did not claim that he had taken Xanax involuntarily or that someone had slipped it into his drink without his knowledge. Defendant again confessed to the shooting, but stated that he was persuaded to do what he did by his brother's ex-girlfriend. When defendant realized that he had killed someone, he lamented, "I just killed someone's mom," and asked if he was going to be spending the rest of his life in prison.

During cross-examination, the police officer who interviewed defendant admitted that defendant had the opportunity to shoot one of the guests in the living room, but that instead of doing so, defendant only fired shots into the living-room floor. The investigating officer also conceded that defendant was consistent in stating—during his interviews with police— that he did not intend to kill anyone.

Police obtained two videos of defendant's conduct that had been posted to social media on the night of the incident. The trial court allowed the prosecutor to play these videos for the jury, over defendant's objection. In the first video, defendant stated several times that he wanted to shoot or kill people. Specifically, defendant made repeated threats to shoot police officers. Defendant also made more threats to shoot other people or saw their heads off, and the video showed him running one of the chainsaws that he had in the vehicle, while making these threats. Defendant stated on the video that he was going to prison and joining the Aryan Brotherhood. The second video showed defendant breaking into the house and firing the handgun multiple times.

Defendant chose not to testify in his own defense.

On appeal, defendant admits that he was evaluated before trial for competency and criminal responsibility. Defendant further admits that the examiner found him competent to stand trial and that the examiner determined that the available information did not support a defense of temporary insanity. At a pretrial motion hearing regarding the admissibility of the videos, defense counsel stated on the record that he had considered raising a temporary-insanity defense, but that he chose not to do so because defendant's intoxication on the date of the shooting appeared to him to be voluntary. As defense counsel stated:

> There is some testimony that will be coming through the video with the officer of [defendant] being on Social Security Disability for ODD, ADHD, and some other issues. I just want the record to be clear that I have researched ODD, I have researched ADHD, I have sent him to forensics, that being [defendant], I

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> have reviewed those forensic reports yet again this weekend. I cross referenced those with other cases with individuals with ODD and ADHD to determine whether or not I needed to seek potentially an expert regarding his mental state of mind on that evening. And again, I'm just making a record because I've looked at all those avenues and I don't see where I can, because of the voluntary intoxication, do that. So, I have reviewed that with [defendant]. He is aware of our trial strategy at this point. I mean, it really doesn't change my trial strategy too much, so we're prepared for trial to start tomorrow, your Honor.

At trial, defense counsel did not argue that defendant was not guilty of first-degree home invasion or possession of a firearm during the commission of a felony. Instead, defense counsel argued that defendant was guilty of involuntary manslaughter, rather than first-degree or second-degree murder. Therefore, it is apparent that defense counsel's trial strategy was to create reasonable doubt regarding defendant's intent and lack of premeditation at the time of the shooting, rather than to argue temporary insanity.

The jury acquitted defendant of first-degree premeditated murder, MCL 750.316(1)(a), but convicted defendant of first-degree felony murder, MCL 750.316(b), first-degree home invasion, MCL 750.110(a)(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The trial court sentenced defendant to concurrent sentences of life in prison without the possibility of parole for his conviction of first-degree felony murder, 14 to 20 years in prison for his conviction of first-degree home invasion, and a consecutive sentence of two years in prison for his conviction of felony-firearm.

Defendant submits on appeal an affidavit from a psychiatrist, Dr. Gerald A. Shiener, opining that "it is possible" that a 20-year-old man with a diagnosis of Attention Deficit Disorder and Oppositional Defiant Disorder who consumes alcohol and Xanax might become temporarily insane. In that affidavit, the psychiatrist conceded that he did not personally evaluate defendant and he did not opine that defendant was temporarily insane at the time he committed the shooting.

Defendant also submits on appeal an affidavit from his appellate counsel recounting defendant's statements to his appellate counsel that defendant's girlfriend told him that she saw his brother's ex-girlfriend slip Xanax into his drink on the night of the incident. Defendant does not offer an affidavit from his brother's ex-girlfriend, who purportedly placed the Xanax in his drink, or from his girlfriend, who purportedly saw this happen. Notably, no testimony was offered at trial suggesting that defendant consumed Xanax involuntarily on the night of the shooting, and defendant has offered no testimony by way of affidavit that any witness is willing to testify that he did so.

Defendant now appeals, arguing that he received ineffective assistance of counsel, that his sentence for the conviction of first-degree felony murder constituted cruel and unusual punishment, and that the trial court erred when it admitted into evidence the video taken by defendant before the shooting and the audio recording of the 911 call made by the victim's boyfriend.

II. ANALYSIS

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A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he received ineffective assistance of counsel because defense counsel did not secure an expert witness to testify that he was temporarily insane at the time of the shooting. We conclude that defendant's argument is without merit.

Determining whether a defendant received ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). This Court reviews findings of facts for clear error and questions of law de novo. *Id.* When the trial court does not hold an evidentiary hearing, there are no factual findings to which the reviewing court must defer, and this Court's review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

To receive a new trial based on ineffective assistance of counsel, defendant must show both that counsel's representation fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Accordingly, a defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Because defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial if it is one that might have made a difference in the outcome of the trial. See *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defense counsel is afforded wide latitude on matters of trial strategy, and we will not substitute our own judgment for that of defense counsel on matters of trial strategy. See *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). There are countless ways to provide effective assistance in any given case, and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *People v Fackelman*, 489 Mich 515, 598; 802 NW2d 552 (2011), quoting *Strickland*, 466 US at 689. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy," *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), and the "fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel," *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Essentially, defendant argues that his trial counsel should have pursued a defense strategy of arguing temporary insanity, and that counsel's failure to pursue that strategy constituted ineffective assistance. This argument is without merit. Defense counsel presented a substantial defense that defendant lacked the requisite intent to establish premeditation and deliberation. For example, defense counsel questioned the homeowner during cross-examination about defendant breaking into the house and how defendant never spoke to, looked at, pointed the handgun at, or moved toward the homeowner. Defense counsel also questioned the victim's boyfriend about how defendant saw him enter the bedroom and close the door, but that defendant never entered

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the bedroom in pursuit. Moreover, defense counsel questioned the police officer who interviewed defendant to elicit testimony that defendant had the opportunity to shoot one of the guests in the house, but he instead fired shots into the living-room floor. Choosing to argue that defendant lacked the requisite intent, which led to defendant's acquittal of first-degree premeditated murder, was a reasonable trial strategy. We will not substitute our own judgment for that of defense counsel regarding his choice of trial strategy. See *Unger*, 278 Mich App at 242-243.

Nonetheless, defendant cites *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015), for the proposition that defense counsel should have called an expert witness to opine that defendant was temporarily insane at the time of the shooting. *Ackley* is distinguishable, however, because the defense counsel in that case never "read any medical treatises or other articles about the medical diagnoses at issue." *Id.* at 386. In this case, defense counsel stated on the record at a pretrial motion hearing that he thoroughly researched defendant's medical issues and considered raising an insanity defense, but decided against it because of defendant's voluntary intoxication. To establish an insanity defense, a defendant must show that, as the result of a mental illness, the defendant lacked the "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009) (cleaned up). Yet, a defendant "who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." MCL 768.21a(2). In defendant's recorded statements to police, he admitted that he voluntarily consumed alcohol on the night of the shooting. Therefore, defendant lacked a potential defense that he was temporarily insane.

Defendant attempts to refute the voluntariness of his intoxication by arguing that it was the combination of the alcohol and Xanax that may have caused him to become temporarily insane, and that he consumed the Xanax involuntarily, even if he consumed the alcohol voluntarily. Defendant's argument is not factually supported by the record. Defendant admitted to police that he consumed Xanax in combination with alcohol, but did not claim that he had taken Xanax involuntarily or that someone had slipped it into his drink without his knowledge. Furthermore, no testimony was offered at trial that defendant consumed Xanax involuntarily on the night of the shooting.

Defendant attempts to establish that his consumption of Xanax was involuntary by submitting an affidavit from his appellate counsel. In that affidavit, appellate counsel states that defendant told her that his girlfriend told him that she saw defendant's brother's ex-girlfriend "put Xanax in [defendant]'s alcoholic drink and that [defendant] drank it not knowing that it had been spiked." Notably, defendant does not offer an affidavit from his brother's ex-girlfriend, who allegedly placed the Xanax in defendant's drink, or from his girlfriend, who purportedly saw this happen. Appellate counsel's affidavit is not a proper offer of proof because it does not establish that any witness would testify on remand that defendant consumed Xanax involuntarily on the night of the shooting.

Defendant also argues that, even if he consumed both the alcohol and Xanax voluntarily, he was nonetheless entitled to raise the defense of temporary insanity. To support his argument,

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defendant relies on *People v Conrad*, 148 Mich App 433; 385 NW2d 277 (1986).[1] In *Conrad*, a panel of this Court held that, although MCL 768.21a(2) excludes voluntary drug or alcohol intoxication from the definition of legal insanity, "if a defendant is actually and demonstrably rendered insane by the ingestion of mind-altering substances, an insanity defense is not absolutely precluded." *Id.* at 441. In that case, the defendant presented evidence that the ingestion of PCP caused defendant to suffer from a long-term mental illness, and it was that mental illness that gave rise to a potential insanity defense. Because there is no indication in this case that defendant's ingestion of Xanax caused him to suffer from a long-term mental illness, *Conrad* is readily distinguishable.

Furthermore, defendant's offer of proof regarding this issue is deficient. Defendant provided this Court with an affidavit from Dr. Shiener, opining that "it is possible" that a 20-year-old man with a diagnosis of Attention Deficit Disorder and Oppositional Defiant Disorder who consumes alcohol and Xanax might become temporarily insane. In that affidavit, the psychiatrist conceded that he did not personally evaluate defendant and he did not opine that defendant himself was temporarily insane at the time he committed the shooting. As the affidavit does not establish the factual basis for a conclusion that defendant's consumption of alcohol and Xanax in combination caused him to suffer from a long-term mental illness, as in *Conrad*, and does not establish how the consumption of alcohol and Xanax impacted this defendant specifically, defendant has not established the factual predicate for his claim of ineffective assistance of counsel. See *Carbin*, 463 Mich at 600.

Even if we agreed that defense counsel's representation fell below an objective standard of reasonableness, defendant would still be "required to demonstrate prejudice to obtain relief on a claim of ineffective assistance." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). To prove prejudice, defendant would have to prove a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Defendant did not argue that defense counsel's failure to call the now-desired expert witness would have resulted in a different outcome. Instead, defendant simply argues that the failure to call such an expert witness "may have" prejudiced him, and this is not sufficient. Accordingly, defendant has failed to establish that he is entitled to relief based on his counsel's failure to argue temporary insanity or to elicit testimony from an expert witness on this issue.

B. CRUEL AND UNUSUAL PUNISHMENT

Defendant next argues that the trial court's imposition of a mandatory sentence of life in prison without the possibility of parole for the conviction of felony-murder violates his due-process rights and constitutes cruel and unusual punishment because he was only 19 years old at the time of the offense. Defendant essentially invites this Court to extend the United States

[1] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

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Supreme Court's holding in *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), to the facts of this case.

Because defendant did not raise this argument at sentencing, it is unpreserved for appellate review. This Court reviews unpreserved issues of constitutional error for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid issue forfeiture under the plain-error rule, defendant must prove the following: (1) there was an error, (2) the error was plain, and (3) the plain error affected substantial rights, i.e., the outcome of the trial-court proceedings. *Id.* at 763. Once defendant has established these requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id.* Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. See *id.*

The United States Constitution prohibits "cruel *and* unusual punishments," and the Michigan Constitution forbids "cruel *or* unusual punishment." US Const, Am VIII (emphasis added); Const 1963, art 1, § 16 (emphasis added). Michigan's prohibition against cruel or unusual punishment is interpreted more broadly than the federal prohibition. See *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992). Accordingly, if a sentence is constitutional under Michigan's Constitution, it is also constitutional under its federal counterpart. *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000). A sentence constitutes cruel or unusual punishment when it is grossly disproportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Bullock*, 440 Mich at 32. "In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Bowling*, 299 Mich App 552, 557-558; 830 NW2d 800 (2013).

In this case, defendant has not demonstrated that his sentence is cruel or unusual by comparing it to the penalties imposed for other crimes in this state and the same crime in other states. Nor has defendant demonstrated that he has the maturity of the typical defendant under the age of 18, or that he has lessened culpability or a greater capacity for change than other persons. Defendant simply argues that his birthdate and age on the date of the offense entitle him to relief from his sentence. Without any proof regarding his intelligence, maturity level, impulse control, appreciation for the consequences of his actions, appreciation for delayed gratification, and ability to control his actions, defendant has not demonstrated entitlement to relief on this issue. We decline to accept defendant's invitation to extend the holding in *Miller* in this case.

C. ADMISSION OF EVIDENCE

Lastly, defendant argues that the trial court abused its discretion when it admitted the 911 call from the victim's boyfriend and the video taken by defendant before the shooting.

This Court reviews preserved claims of evidentiary error for an abuse of discretion. See *People v Bergman*, 312 Mich App 471, 482; 879 NW2d 278 (2015). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and

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principled outcomes." *Id.* at 483 (cleaned up). "If the court's evidentiary error is nonconstitutional and preserved, then it is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (cleaned up).

MRE 401 defines relevant evidence as evidence "having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides that all relevant evidence is admissible unless otherwise prohibited by the United States or Michigan Constitutions, the rules of evidence, or other rules adopted by the Supreme Court. MRE 403 prohibits the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the cumulative evidence. In the context of MRE 403, "prejudice means more than simply damage to the opponent's cause." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). It means that evidence has an undue tendency to move the jury to decide on an improper basis such as an emotional bias. *Id.* Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Mere prejudice is insufficient to justify reversal of a conviction. *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003).

In this case, the trial court admitted the videos that defendant recorded and posted to social media, over defendant's pretrial objection and motion to suppress. Defendant appeals only the admission of the video of his conduct leading up to the shooting. Defendant does not appeal the admission of the video that he recorded while committing the charged offenses. Defendant argues that his statements in the first video about killing police officers and joining the Aryan Brotherhood were not relevant to the shooting that he committed just minutes later and that these statements gave rise to unfair prejudice.

Importantly, the prosecutor offered the video to prove—with defendant's own words and conduct—that defendant possessed premeditation and deliberation sufficient to support a conviction of first-degree murder. Yet, the jury only convicted defendant of first-degree felony murder, first-degree home invasion, and felony-firearm, which suggests that the jury did not believe beyond a reasonable doubt that defendant had the requisite intent to have committed first-degree murder. Nonetheless, the trial court's decision to admit the video in its entirety was not outside the range of reasonable and principled outcomes. See *Bergman*, 312 Mich App 483. The videos could have allowed the jury to determine defendant's intent leading up to the shooting, notwithstanding the jury's actual verdict with the added benefit of hindsight.

Even assuming that defendant's statements and conduct depicted in the first video created the danger of unfair prejudice, the trial court properly instructed the jury that it was not to allow sympathy or prejudice influence its decision. A jury is presumed to follow its instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The challenged evidence was not substantially more prejudicial than probative. See *id.* at 235.

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With regard to the 911 calls, defendant appeals only the admission of the second call placed by the victim's boyfriend; he does not appeal the admission of the call placed by the homeowner. Even assuming for the sake of argument that the second 911 call should not have been entered in evidence, reversal is not required because its admission was not outcome-determinative. See *Douglas*, 496 Mich at 565-566. Given the overwhelming evidence of defendant's guilt, the reliability of the outcome is not undermined by the admission of this evidence. See *id.*

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Affirmed.

/s/ Thomas C. Cameron
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL CONNER,

Defendant-Appellant.

UNPUBLISHED
December 17, 2019

No. 343286
Oakland Circuit Court
LC No. 2017-261380-FC

Before: BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment without the possibility of parole for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals by delayed leave granted. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

I. BACKGROUND

On the afternoon of August 31, 2016, defendant and his friends, Cordai Wallace and Deshawn Jones, were walking to a basketball court in a neighborhood in Pontiac, Michigan. As they were proceeding to the basketball court, an individual later identified as Jesson Iglesias approached defendant, pulled eight dollars out of his pocket and asked to buy some marijuana. According to Wallace, defendant took Iglesias' money and the entire group ran away, with Iglesias in pursuit yelling at defendant to give him back his money. Wallace testified that as they ran away, he heard two gunshots, looked back and saw defendant running toward him with a gun in his hand. Iglesias later died from a gunshot wound to the chest.

Wallace testified that after hearing the shots, he and Jones ran in a different direction than defendant. At some point Jones called his cousin, Breanna Hughes, to come and get him and Wallace. When her car arrived at the spot where Jones and Wallace had run to, Wallace noted that defendant was already in the car. Hughes then dropped the three off at a party store.

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A woman who was babysitting her grandchildren near where the shooting occurred, testified that she saw a group of four people walking down the street. The group consisted of three black males, between the ages of 18 and 22, and one Hispanic male, who was "35, 40 maybe." The three black males were walking ahead of the Hispanic man, later identified as Iglesias. One of the black males turned and pointed a gun at Iglesias. A few seconds later, she heard two gunshots. The gunman put the gun back in his pocket, continued walking, and Iglesias followed him. At that time, it did not appear to the witness that Iglesias had been shot because he continued to walk behind the group.[1] The women briefly lost sight of the group because of a tree. Approximately five minutes later, she saw Iglesias coming back down the street, "covered in blood," and realized he had been shot. When she and others[2] approached him, Iglesias stated: "They done shot me in my heart."

The neighbor went to the police station on August 31, 2016, where she was shown several photographic arrays, and selected Jones as resembling the person who pointed the gun at Iglesias. At trial, she testified that she was not sure that she selected the right person, stating she was focused more on the gun than on their faces.

Detective Maurice Martin testified that he and his partner, Detective Dawn Mullins, investigated the case and interviewed defendant on November 11, 2016. After waiving his *Miranda*[3] rights, defendant gave a statement to the police, which was videotaped and played for the jury. Martin testified that defendant first denied having any knowledge of the shooting, stating that he was walking with two other individuals, talking on his phone, heard gunshots, and ran. After Martin inquired of defendant how he would know "exactly where the area was that the victim was hit" if he ran after hearing the gunshots, defendant "paused and he stated that he was the person who actually shot Mr. Iglesias." Defendant stated that as he and his two friends were walking down the street, Iglesias approached them, and Jones told defendant to take Iglesias's wallet. Defendant took the wallet and ran, and Iglesias ran after him. Some items fell out of defendant's pocket, he stopped to pick them up, and Iglesias was catching up to him causing defendant to fear "that . . . Iglesias was going to do something to him and he fired the shots." Defendant stated that he got the gun from Jones.

A jury convicted defendant as stated above. Defendant now appeals by delayed leave granted.

II. ANALYSIS

[1] An Oakland County Sheriff's crime scene investigator testified that he found a fired .380 cartridge case and a blood trail from that point that continued past a nearby barbershop. A video from the barbershop surveillance camera was admitted into evidence at trial and played for the jury.

[2] Another female testified that, as she was driving to work, she saw a wounded man and called the police. A male neighbor testified that after hearing gunshots, he observed a man who had been shot "going back and forth" down the street.

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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I. GREAT WEIGHT OF THE EVIDENCE

On appeal, defendant first contends that the prosecution's evidence establishing his identity as the shooter was so inconsistent and incredible that the jury's verdict is against the great weight of the evidence and it would be a miscarriage of justice and a denial of his due process rights to allow the verdict to stand. Defendant raised this issue in a motion for a new trial, which the trial court denied.

We review a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict should be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Absent compelling circumstances, the credibility of witnesses is for the jury to determine. See *Lemmon*, 456 Mich at 642-643.

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Davis*, 241 Mich App at 700.

In seeking to have this Court hold that the verdict was against the great weight of the evidence, defendant directs us to the neighbor's identification of Jones as the shooter. Further, defendant argues that the same witness testified that the shooter wore dark clothes, but on the date and time of the shooting defendant was wearing a white t-shirt and black-and-white gym shorts. Additionally, defendant argues, Jones was approached as the drug dealer, and until Martin told defendant that he did not believe him, defendant's statements to police were similar to those of other eyewitnesses. Additionally, defendant vociferously argues that Wallace never testified that he actually saw defendant shoot the victim. However, defendant's arguments ignore a majority of the record. The record reveals that numerous people observed that Iglesias had been shot. Wallace, a friend of defendant, and someone whom defendant admitted he was with on the day of the shooting, testified that defendant took money from the victim and then as they began to run away from the victim, Wallace heard gun shots, turned around and saw defendant with a gun in his hand. Defendant admitted to police that he took the victim's wallet. Defendant admitted to police that he ran from the victim because he had taken the victim's wallet. Defendant also admitted to police that he shot the victim as the victim was catching up to defendant.

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While we recognize the inconsistencies defendant argues in his brief on appeal, we cannot find that any of these inconsistencies render any testimony inherently implausible. Additionally, all of the alleged inconsistences were presented to the jury. Our Supreme Court has made clear that in cases where a jury is confronted with inconsistent and impeached testimony, it is not for this Court to act as a 13th juror. See, *Lemmon*, 456 Mich at 640 ("...the thirteenth juror approach has a potential to undermine the jury function and why we now reject it"). Rather, we observe as a cornerstone of our jurisprudence that in matters wherein conflicting testimony is presented, that: "in general conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial," *Lemon*, 456 Mich at 643, quoting *United States v Garcia*, 978 F2d 746,748 (CA1, 1992). Our Courts have been clear on this issue as far back as *Anderson v Conterio,* 303 Mich 75, 79; 5 NW2d 572 (1942) when our Supreme Court held that when testimony is in direct conflict and testimony supporting the verdict has been impeached, if: "it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it," the credibility of witnesses is for the jury.

Here, after due consideration of the entire record, we concur with the conclusions of the trial court that the contradictions in testimony cited by defendant are not particularly incredible, nor was the complained of testimony inherently implausible such that it could not be believed by a reasonable juror. *Lemmon*, 456 Mich at 644. Essentially, these findings formed the basis for the trial court's denial of defendant's motion for a new trial and we find no error in the trial court's analysis or its conclusions. Accordingly, defendant is not entitled to relief on this issue.

II. MANDATORY LIFE SENTENCE

Defendant next argues that because he was only 18 years old at the time of the offense, imposition of the statutory sentence of mandatory life imprisonment without the possibility of parole violates the Eighth Amendment "because the mitigating factors of youth should be considered before a court imposes the harshest sentence."

Whether a statute is constitutional is a question of law that this Court reviews de novo. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000). "Statutes are presumed to be constitutional; and the party challenging the statute has the burden of showing the contrary." *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012). "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16,[4] whereas the United States Constitution prohibits cruel *and* unusual punishment, U.S. Const. Am. VIII.[5]" *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id.* (citation and

[4] The Michigan Constitution provides, "cruel or unusual punishment shall not be inflicted[.]" Const 1963, art 1, § 16.

[5] The Eighth Amendment of the United States Constitution provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII.

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quotation marks omitted). Whether a penalty or sentence imposed against a defendant can be considered cruel or unusual is to be determined by a three-pronged test including: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." *Id.* (citation omitted).

The Legislature has mandated a sentence of life imprisonment without the possibility of parole for adult offenders who commit the crime of first-degree murder. MCL 750.316. In *People v Hall*, 396 Mich 650, 657-658 (1976); 242 NW2d 377 (1976), our Supreme Court upheld this mandated life sentence for felony murder, under both the United States and Michigan Constitutions. Our Supreme Court expressly rejected the defendant's assertions that a mandatory life sentence under MCL 750.316 violated both US Const, Am VIII, prohibiting "cruel and unusual" punishment, and Const 1963, art 1, § 16, forbidding "cruel or unusual" punishment. The Court found that "the punishment exacted is proportionate to the crime," that no indication existed that "Michigan's punishment is widely divergent from any sister jurisdiction," and that the sentence served the Legislature's permissible goal to deter similar conduct by others. *Hall*, 396 Mich at 658. "Legislatively mandated sentences are presumptively proportional and presumptively valid." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). "[A] proportionate sentence does not constitute cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

We concur with defendant that the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In *Miller*, the Court concluded that such mandatory sentencing "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham v Florida*, 560 US 48, 68, 74; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller*, 567 US at 465. The issue, however, is whether *Miller* is applicable here. Defendant does not dispute that at the time the murder was committed he was over the age of 18. Having been over the age of 18 at the time of the commission of the crime, we find *Miller* and *Graham* inapplicable.

Defendant also argues that scientific studies support that the same basis the Supreme Court applied in *Miller* and *Graham* to hold mandatory life without parole sentences unconstitutional applies to 18-year-old offenders, like defendant, whose brains are continuing to mature. Again, defendant is not a member of that class of individuals addressed in *Miller* and *Graham*. While we understand the argument advanced by defendant, that for social scientists youth is an ever-evolving concept, at their core, defendant's arguments are merely an attempt to have this Court expand *Miller* and *Graham* beyond their holdings. Notably, the Supreme Court's decisions in *Graham* and *Miller* are rooted in that Court's prior decision in *Roper v Simmons*, 543 US 551, 574; 125 S Ct 1183; 161 L Ed 2d 1 (2005), in which the Court stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never

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> reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* [*v Oklahoma*, 487 US 815; 108 S Ct 2687; 101 L Ed 2d 702 (1988),] drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Accordingly, the Eighth Amendment does not bar Michigan from imposing a mandatory sentence of life without parole on offenders who commit first-degree murder after reaching the age of 18. Therefore, we reject defendant's claim that he is entitled to a "*Miller* hearing."

III. DEFENDANT'S STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that he was denied his constitutional right to a properly instructed jury because the verdict form did not provide the jury with a general "not guilty" option, and did not allow the jury the opportunity to find him not guilty of the lesser offense of second-degree murder. We review this unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Due process requires that the trial court "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 584-585; 556 NW2d 820 (1996) (citations omitted). Defendant correctly observes that "a criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *People v Wade*, 283 Mich App 462, 467; 771 NW2d 447 (2009). However, that is not what occurred here. In this case, the verdict form provided the jury with the following three options for the first-degree felony-murder count:

> ____Not Guilty
>
> ____Guilty of Homicide - First Degree Felony Murder
>
> ____Guilty of the lesser offense of Second Degree

Relative to this case, the verdict form specifically allowed the jury to select a general "Not Guilty" verdict regarding the felony-murder charge. The trial court also instructed the jury that one of the available options for the felony-murder charge was "not guilty" and to "return only one verdict on each count." The jury convicted defendant of the highest offense, first-degree felony murder. Accordingly, defendant's unpreserved challenge to the jury verdict form

does not warrant relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Michael J. Kelly

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2018
v	No. 337433 Wayne Circuit Court
BRENDON DIYAMO STANTON-LIPSCOMB, Defendant-Appellant.	LC No. 16-002452-01-FC

Before: M. J. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant, Brendon Stanton-Lipscomb, appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced Stanton-Lipscomb to life in prison without parole for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

Stanton-Lipscomb's convictions arise from a gang-related shooting at the Eastland Mall in Harper Woods. Approximately two years before the offense, Stanton-Lipscomb's close friend and cousin, Rob Carter, was killed in a drive-by shooting. Members of the Hob Squad gang were allegedly responsible for that shooting. Before Carter's death, Stanton-Lipscomb was associated with the Eastside Ghetto Boys (EGB) gang. After Carter was killed, Stanton-Lipscomb formed the Rob Gang, which operated as a rival to the Hob Squad gang. Tyler Tate, Demetrius Armour, and Tyshon Taylor were all members or supporters of the Rob Gang or affiliated gangs.

On December 26, 2015, Tyrell Lane, a Hob Squad member, was shot and killed after exiting the Burlington Coat Factory store at the Eastland Mall. At trial, the prosecution presented evidence that Tate and Taylor encountered Lane at the mall and called Stanton-Lipscomb to notify him of Lane's presence. Thereafter, Stanton-Lipscomb, Armour, and Stanton-Lipscomb's girlfriend drove together to the mall. Stanton-Lipscomb went inside and Armour parked the car near the exit to the Burlington store. Stanton-Lipscomb spoke with Taylor inside the mall and then went back outside. The prosecution's theory was that Stanton-Lipscomb concealed himself behind a concrete pillar outside the Burlington store entrance, that

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Tate escorted Lane through the Burlington store to the store's exterior exit, and that Stanton-Lipscomb shot Lane when Lane exited the store. Stanton-Lipscomb fled the scene in Armour's waiting vehicle. At trial, Stanton-Lipscomb's girlfriend, who was present during the shooting, identified him as the shooter. Her testimony was corroborated by surveillance videos from the mall's security camera system. In addition, numerous postings and messages from Facebook and cell phone accounts associated with Stanton-Lipscomb supported his identity as the person responsible for murdering Lane.

Stanton-Lipscomb, Tate, Taylor, and Armour were all eventually charged with first-degree premeditated murder in connection with Lane's death, but they were prosecuted separately. Stanton-Lipscomb was convicted in June 2016. Thereafter, Taylor pleaded guilty to a reduced charge of second-degree murder, MCL 750.317. In January 2017, a jury convicted Armour of first-degree premeditated murder, and in April 2017, another jury convicted Tate of first-degree premeditated murder, as well as making a false report of a felony, MCL 750.411a(1)(B), and lying to a police officer in a criminal investigation, MCL 750.479c(2)(d)(*i*). Armour's appeal in Docket No. 337434, and Tate's appeal in Docket No. 338360 have been submitted with the instant appeal.

II. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

At trial, Stanton-Lipscomb attempted to introduce a police officer's testimony that Tate had identified someone else as a possible suspect. The trial court sustained the prosecutor's objection to this testimony as inadmissible hearsay. Stanton-Lipscomb now argues that the exclusion of this testimony violated his constitutional right to present a defense. Because Stanton-Lipscomb did not raise this constitutional claim in the trial court, this issue is unpreserved. We review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

B. ANALYSIS

"There is no doubt that based on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process or Confrontation Clauses, 'the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.' " *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012), quoting *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (quotation marks omitted). Yet, "[t]he right to present a complete defense 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " *King*, 297 Mich App at 473, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Thus, an accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *King*, 297 Mich App at 474 (quotation marks and citations omitted). "Michigan, like other states, has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials." *Id.* at 473 (quotation marks and citation omitted). "The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 474 (quotation marks and citation omitted).

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MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Stanton-Lipscomb sought to admit Tate's out-of-court statement identifying someone other than Stanton-Lipscomb as a possible perpetrator. Because this statement was offered for its truth (i.e., to prove that someone other than Stanton-Lipscomb was identified as the possible perpetrator), it was hearsay as defined in MRE 801(c). Under MRE 801(d)(1)(C), however, a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . (C) one of identification of a person made after perceiving the person . . . ." Nevertheless, Tate did not testify at trial and was not subject to cross-examination concerning the statement, so the exemption to the definition of hearsay in MRE 801(d)(1)(C) is inapplicable. And, as no other exemption or exception to the hearsay rule applies, the statement was inadmissible. MRE 802.

Furthermore, we reject Stanton-Lipscomb's reliance on *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996), as supporting his argument that the trial court violated his constitutional right to present a defense by mechanistically excluding Tate's statement as inadmissible hearsay, without acknowledging that his right to present evidence in his defense outweighed adherence to the hearsay rule. In *Barrera*, the three defendants, Barrera, Johnson, and Musall, were prosecuted for the murdering a prostitute. A fourth defendant, Copeland, also was charged with the murder, but tried separately. *Id.* at 264-265. The three defendants sought to admit Copeland's admission to the police that, because he was under the influence of drugs that made him believe that the victim was his girlfriend, he stabbed the victim while she gave oral sex to Musall. *Id.* at 265. Two of the defendants, Barrera and Musall, argued that Copeland's police statement was admissible under the hearsay exception for statements against penal interest, MRE 804(b)(3). *Id.* at 266. The trial court disagreed and excluded the statement. *Id.* Our Supreme Court extensively analyzed the requirements for admission of a statement under MRE 804(b)(3). With respect to the requirement of corroborative evidence, the Court stated that

> the defendant's constitutional right to present exculpatory evidence in his defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission . . . . [*Barrera*, 451 Mich at 279.]

The Court concluded that when the reliability of Copeland's statement was balanced against its exculpatory value for Barrera and Musall, the defendants' due process rights required admission of the statement. *Id.* at 290-291.

Barrera is distinguishable from the instant case. In *Barrera*, the non-testifying codefendant's statement qualified for admission under the hearsay exception for statements against penal interest. MRE 804(b)(3). The Supreme Court ultimately determined that the statement was sufficiently reliable in consideration of its exculpatory value for the defendants. *Barrera*, 451 Mich at 290-291. In this case, Tate's identification does not qualify under *any* hearsay exception, and it is not excluded from the definition of hearsay. Moreover, there are no indicia of reliability in Tate's statement. On the contrary, the circumstances of his identification indicate that he was attempting to exculpate himself by deflecting suspicion away from a co-

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participant. At the time the photographic lineup was conducted, Tate was considered a possible additional victim. After further investigation, however, he had been identified as a co-participant for his role in knowingly luring Lane to the location where Stanton-Lipscomb shot him. These circumstances indicate that he had a motive to deflect suspicion away from Stanton-Lipscomb. Accordingly, application of the rules of evidence to exclude this hearsay statement did not violate Stanton-Lipscomb's constitutional right to present a defense.

III. SENTENCE

A. STANDARD OF REVIEW

Next, Stanton-Lipscomb argues that because he was only 18½ years old at the time of the offense, imposition of the statutory sentence of mandatory life imprisonment without the possibility of parole violates his Eighth Amendment right against cruel and unusual punishment. Because defendant did not challenge the constitutionality of this statutory penalty at sentencing, this issue is unpreserved. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). We review unpreserved claims of sentencing error for plain error affecting defendant's substantial rights. *Id.*

B. ANALYSIS

In *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), the United States Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits a sentence of life in prison without parole for a juvenile offender convicted of a non-homicide crime. Later, in *Miller v Alabama*, 567 US 460, 489; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Court held that a mandatory sentence of life imprisonment without the possibility of parole for juvenile offenders under the age of 18 convicted of murder constitutes cruel and unusual punishment. Stanton-Lipscomb acknowledges that *Graham* and *Miller* do not apply to him because he was convicted of murder and because he was 18 ½ years old at the time of the offense. He argues, however, that use of an offender's eighteenth birthday as the cutoff for when a mandatory life sentence becomes constitutionally permissible is arbitrary, unscientific, and a baseless legal fiction, and that the rationale in *Miller* applies equally to him, rendering his mandatory sentence of life without parole unconstitutionally cruel and unusual.

However, the decisions in *Graham* and *Miller* are rooted in the Court's prior decision in *Roper v Simmons*, 543 US 551, 574; 125 S Ct 1183; 161 L Ed 2d 1 (2005), in which the Court stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* [*v Oklahoma*, 487 US 815; 108 S Ct 2687; 101 L Ed 2d 702 (1988),] drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age

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> of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

The Supreme Court's statement in *Roper* reflects that categorical distinctions, albeit imperfect, are necessary in the administration of justice. This statement also reflects that the age of 18 is widely accepted as the point at which adult privileges and responsibilities begin in a broad spectrum of activities. Accordingly, the Eighth Amendment does not bar Michigan from imposing a mandatory sentence of life without parole on offenders who commit first-degree murder after reaching the age of 18.

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEX JAY ADAMOWICZ,

Defendant-Appellant.

UNPUBLISHED
June 22, 2017

No. 330612
Oakland Circuit Court
LC No. 2014-251162-FC

Before: STEPHENS, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree murder, MCL 750.316(1)(a). The trial court sentenced defendant to life imprisonment without parole. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the death of John Watson at the Tivoli Apartments in Walled Lake. Watson and defendant lived in the same building. In the early morning hours of April 12, 2014, Watson entered defendant's apartment to drink and smoke "weed." According to defendant, Watson became agitated. When defendant asked Watson to leave and threatened to call the police, an altercation ensued, which ended with defendant cutting Watson's throat.[1] Watson died from the injury.

Defendant covered Watson's body with blankets, and moved him from the couch to a closet in the apartment. He also attempted to clean the blood spatter from the walls and the couch. Defendant continued to live in the apartment until May 11, 2014, when defendant's mother, Marie Holley, discovered Watson's body. That day, the two drove to the Wixom Police Station. While at the station, defendant spoke with Walled Lake Police Detective Andrew Noble and confessed to killing Watson, but maintained that he did so in self-defense.

[1] Dr. Ruben Ortiz-Reyes, the deputy medical examiner that conducted Watson's autopsy, testified that the injury to Watson's neck was 6 inches by 2 inches and 4 inches deep.

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II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his trial counsel was ineffective for failing to call an expert witness that could explain his behavior following Watson's death.

Generally, to preserve an ineffective assistance of counsel argument, a defendant must file a motion for a new trial or *Ginther*[2] hearing in the trial court to establish evidentiary support for the argument. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant failed to raise this issue in a motion for a new trial or *Ginther* hearing in the trial court, and this Court denied defendant's motion to remand. *People v Adamowicz*, unpublished order of the Court of Appeals, entered September 23, 2016 (Docket No. 330612). Thus, our review is limited to the appellate record. *Sabin (On Second Remand)*, 242 Mich App at 658-659.[3]

Analysis of ineffective assistance of counsel arguments involves mixed questions of law and fact. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). We review a trial court's findings of fact for clear error, and questions of constitutional law de novo. *Id.*

To evaluate whether ineffective assistance of counsel was provided, we use the standard established in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). The defendant must show: '(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. The effective assistance of counsel is presumed, *People v Roscoe*, 303 Mich App 633, 644; 846 NW2d 402 (2014), and the defendant must overcome the presumption that defense counsel's actions constituted sound trial strategy, *Trakhtenberg*, 493 Mich at 52. Further, the defendant must establish a factual predicate for his claim. *Hoag*, 460 Mich at 6.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). However, such a decision must be made only after counsel has conducted an adequate investigation of the relevant facts and law. *People v Ackley*, 497 Mich 381, 390; 870 NW2d 858 (2015). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.' " *Payne*, 285 Mich App at 190, quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). " 'A substantial defense is one that might have made a difference in the outcome of the trial.' " *People v Chapo*,

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] Defendant's submission of Coryanna Ku's and Edward Bajoka's affidavits violates the court rule that prohibits citing to matters outside the record. MCR 7.210(A)(1); see also *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000) ("[P]arties cannot enlarge the record on appeal by the use of affidavits.").

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283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant correctly asserts that the prosecution focused its case on the theory that, had he killed Watson in self-defense, he would have immediately come forward to the police. In his opening statement and closing argument, the prosecutor repeatedly said, "The guilty flee when no man pursues, but an innocent man is as bold as a lion." Further, the prosecution's witnesses testified regarding defendant's calm demeanor when speaking to the police about the incident, as well as the actions defendant took to conceal Watson's death, including hiding the body and attempting to clean the blood.

However, defendant failed to establish a factual predicate for his argument that, had defense counsel called an expert witness to explain defendant's behavior following Watson's death, there is a reasonable probability that the outcome of trial would have been different. He merely speculates that expert testimony regarding behaviors associated with post-traumatic stress disorder would have been favorable and would have effectively countered the prosecution's theory. See *Payne*, 285 Mich App at 190 (holding that the defendant failed to demonstrate ineffective assistance of counsel because he "merely speculated that an independent expert could have provided favorable testimony").

Moreover, defendant cannot overcome the presumption that defense counsel's decision not to call an expert constituted sound trial strategy. Rather than placing more intense focus on defendant's behavior following Watson's death, it appears that defense counsel attempted to rebut the prosecution's argument by acknowledging defendant's actions, but concentrating on defendant's description of, and state of mind during, his altercation with Watson. As an example, in his opening statement, defense counsel opined that people react to traumatic events differently, and that defendant may not have had the best reaction, but asked the jury not to judge the case based on defendant's behavior after Watson's death. Further, during direct examination of defendant, he asked defendant to describe what happened during the altercation with Watson, and inquired as to whether defendant feared for his life at the time of the incident. Although this strategy may have ultimately been unsuccessful, this Court "will not second-guess counsel regarding matters of trial strategy," or "assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Thus, defendant's ineffective assistance of counsel argument fails.

II. PROSECUTORIAL ERROR

Defendant next argues that he is entitled to a new trial because the prosecutor's questions to him and to Detective Noble regarding his ability to flee during the altercation with Watson, as well as the prosecutor's statements during closing argument suggesting that he could have safely retreated, constituted prosecutorial misconduct. He also asserts that defense counsel provided ineffective assistance when he failed to object to the questions and statements.

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To preserve a prosecutorial error[4] argument, a defendant must contemporaneously object to the alleged error and ask for a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). If a defendant fails to timely and specifically object below, review is generally precluded " 'except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.' " *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defense counsel failed to object to the prosecution's questions regarding defendant's ability to flee during the incident, or to the prosecutor's statements during closing argument. Thus, the issue is not preserved for appellate review.

Unpreserved issues of prosecutorial error are reviewed for "outcome-determinative, plain error." *Unger*, 278 Mich App at 235. To establish plain error affecting substantial rights "three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). " 'Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Unger*, 278 Mich App at 235, quoting *Callon*, 256 Mich App at 329.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

During direct examination, the prosecutor asked Detective Noble several times whether, during the interviews with defendant, defendant ever said that he could have fled the apartment during the altercation with Watson. He also asked defendant similar questions during cross-examination, and referenced this testimony throughout his closing argument. Defendant argues that these questions and statements were legally irrelevant and prejudicial because defendant had no duty to retreat before killing Watson in self-defense.

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[4] Although this type of issue is generally referred to as "prosecutorial misconduct," this Court has stated that, "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct," but that arguments "premised on the contention that the prosecutor made a technical or inadvertent error at trial" are "more fairly presented as claims of 'prosecutorial error[.]' " *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015) (citation omitted). Nevertheless, regardless of "what operative phrase is used, [this Court] must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Id.* at 88, citing *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Here, we will refer to defendant's argument as prosecutorial error, as the argument is limited to technical errors by the prosecutor.

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In 2006,[5] the Legislature enacted the Self-Defense Act (SDA), MCL 780.971 *et seq.*, which "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). MCL 780.972 provides, in pertinent part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

"The reasonableness of a person's belief regarding the necessity of deadly force 'depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor.' " *People v Guajardo*, 300 Mich App 26, 42; 832 NW2d 409 (2013), quoting *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011).

We note initially that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence," *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010) (citation and quotation marks omitted). Defendant has presented no evidence that the prosecutor did not act in good faith when he elicited the now-challenged testimony, or when, during closing argument, he reasonably inferred from this testimony that defendant lacked an honest and reasonable belief that the use of deadly force against Watson was necessary.

Further, the record and relevant caselaw support the conclusion that the prosecutor acted in good faith when presenting the evidence. In *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002), decided before enactment of the SDA, the Michigan Supreme Court stated: "We reaffirm today that the touchstone of *any* claim of self-defense, as a justification for homicide, is *necessity*. An accused's conduct in failing to retreat, or to otherwise avoid the intended harm, may in some circumstances – other than those in which the accused is the victim of a sudden, violent attack – indicate a lack of reasonableness or necessity in resorting to deadly force in self-defense." But the Court further reasoned that "[i]t is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling[.] *Id.* at 134.

However, in *People v Richardson*, 490 Mich 115, 118-121; 803 NW2d 302 (2011), a case where the defendant fired shots from his porch, the Court upheld the following jury instruction:

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[5] Except as provided in MCL 780.972, the Self-Defense Act (SDA) did "not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force." MCL 780.973.

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> (1) A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use deadly force in self-defense.
>
> (2) However, a person is never required to retreat if attacked in [his/her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.

In so doing, the Court reasoned: "At trial, the prosecutor never argued that defendant was required to, or even should have, retreated from the altercation. In attempting to rebut defendant's self-defense claim, the prosecutor argued only that defendant could not establish that he honestly and reasonably believed that he needed to use deadly force." *Id.* at 120. The prosecutor clearly stated, in his closing argument, that defendant had no duty to retreat by law, and that he introduced testimony regarding defendant's ability to flee during the altercation with Watson for the purpose of challenging whether defendant honestly and reasonably believed he needed to use deadly force.

Regardless, even assuming, without deciding, that the prosecutor erred by eliciting the testimony, defendant fails to demonstrate that the error affected the outcome of his trial. The court instructed the jury that a person attacked in his own home has no duty to retreat. Curative instructions will cure most inappropriate prosecutorial statements, and it is presumed that jurors follow their instructions. *Unger*, 278 Mich App at 235.

Further, the jury's conviction of defendant for first-degree murder demonstrates that it found he killed Watson with premeditation and deliberation, not just that he lacked an honest and reasonable belief deadly force was necessary to prevent imminent death or great bodily injury. Substantial evidence beyond the testimony regarding defendant's ability to flee supported this determination. " 'The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation.' " *People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016) (citation omitted). " 'To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.' " *Id.* at 266, quoting *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (citation and quotation marks omitted). One factor to consider when analyzing premeditation is a defendant's actions before and after a crime. *Bass*, 317 Mich App at 266. The extreme measures defendant took to conceal Watson's death, the injury defendant inflicted, the searches on defendant's laptop regarding drinking bleach and rat poison, and defendant's testimony that he wanted to get back at Watson for hitting him during the altercation, demonstrate premeditation and deliberation.

Because defendant cannot establish that the prosecutor committed an outcome-determinative error, his ineffective assistance of counsel argument also fails. Defense counsel need not make fruitless or meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

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III. EVIDENTIARY ERROR

Defendant asserts that the court abused its discretion when it admitted into evidence testimony regarding, and a booking photograph from, his April 13, 2014 interaction with police, as well as an audio-less video of his first interview with Detective Noble.

To preserve an evidentiary error for appeal, "a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1) and *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Prior to trial, the prosecution filed a notice of intent to introduce evidence of defendant's April 13, 2014 contact with police under MRE 404(b), asserting that the court should admit the evidence for the non-character purpose of demonstrating defendant's intent and knowledge. On that day, defendant was pulled over by Novi Police Officer Daniel Jenkinson for drunk driving, but failed to disclose Watson's death to the officer. In response, defendant argued that the contact could not be used to prove his guilty mind because the prosecution had not proven that Watson was deceased on that date, evidence of drunk driving is not relevant to murder, and evidence of drunk driving would be overly prejudicial.

Defendant's arguments are not preserved. Defendant did not argue in the trial court, as he does on appeal, that the evidence was not relevant to his guilty mind because silence is a symptom of psychological trauma. Further, defense counsel withdrew the arguments related to drunk driving at the motion hearing when the court ordered that it would admit evidence of the incident without reference to the fact that defendant was pulled over for drunk driving, and failed to object at trial when Officer Jenkinson testified that defendant was intoxicated, or when the prosecution offered defendant's booking photograph for admission.

With regard to the video, when the prosecutor moved to admit the video of defendant's first interview with Detective Noble, and play the video for the jury, defense counsel objected on the basis that, with no audio, "it would potentially prejudice [defendant] if the jury would interpret some of his hand movements or gestures in a way that's totally out of context . . . ." However, defense counsel then admitted that he opened the door to the video's admission. Thus, defendant waived his evidentiary error argument as to the video.

Unpreserved evidentiary claims are reviewed for plain error affecting substantial rights. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). A plain error affects substantial rights when "the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (citation and quotation marks omitted).

In general, other-acts evidence may not be introduced "to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, such evidence may be admissible to demonstrate "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." MRE 404(b)(1).

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Defendant asserts that the evidence regarding his April 13 interaction with police constituted character evidence masquerading as evidence of intent because it did not "make a material fact – guilty mind – more or less probable than it would be without the evidence." Evidence is relevant if it has " 'any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.' " *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003), quoting MRE 401. " 'The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation.' " *Bass*, 317 Mich App at 265-266 (citation omitted). Further, "[o]nce a defendant raises the issue of self-defense and 'satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist,' the prosecution must 'exclude the possibility' of self-defense beyond a reasonable doubt." *People v Stevens*, 306 Mich App 620, 630; 858 NW2d 98 (2014), quoting *Dupree*, 486 Mich at 709-710.

Despite defendant's argument to the contrary, evidence that he interacted with a police officer on April 13, after Watson's death, was relevant to proving that defendant did not act in self-defense, but intended to kill Watson. Factors to consider when analyzing premeditation include a defendant's actions before and after a crime. *Bass*, 317 Mich App at 266. Officer Jenkinson testified that, during his 1½ to 2 hour interaction with defendant, defendant never mentioned killing Watson in self-defense. From that testimony, a rational juror could conclude both that defendant did not act in self-defense, and that he killed Watson with premeditation, because it is reasonable to infer that a person who believes they committed a justifiable killing would divulge such to another. This is especially true considering that, in his written statement to police, defendant said he "was so scared people would just call from the smell and [he] would just confess if anyone asked."

Additionally, the probative value of the testimony and defendant's booking photograph was not outweighed by their prejudicial effect. Relevant evidence may be excluded if the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. " 'Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v Danto*, 294 Mich App 596, 600; 822 NW2d 600 (2011), quoting *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

Defendant argues that the reason for his interaction with police and booking photograph – drunk driving – became apparent during Officer Jenkinson's testimony, making the evidence overly prejudicial because it "implied that just days after Mr. Watson's death, [he] was making reckless decisions and endangering himself and others." However, defendant himself testified that he was put in the "drunk tank" during his interaction with police on April 13, and that after Watson's death, he stayed home all the time and drank and smoked "weed." "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146 (2007). Further, it is unlikely that knowing defendant was intoxicated during the April 13 contact with police affected the jury's perception of Officer Jenkinson's testimony or defendant's photograph, or its ultimate decision in the case. The evidence was clearly intended to demonstrate that defendant had the opportunity to tell the police

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about Watson's death, but failed to do so. And, as discussed, substantial evidence beyond this police interaction existed from which the jury could have concluded that defendant killed Watson with premeditation and deliberation, rather than in self-defense.

With regard to defendant's argument that the trial court erred by admitting into evidence the video of his first interview with Detective Noble, we initially hold that defendant waived this issue. During defense counsel's cross-examination of Detective Noble regarding the interview, the following exchange occurred:

> *Q.* And it's your testimony that [defendant] was completely calm that entire time, correct?
>
> *A.* Yes, correct, for what had taken place.
>
> *Q.* He wasn't crying?
>
> *A.* I didn't see tears.
>
> * * *
>
> *Q.* Okay, and had there been a video of that interview we could have seen what his demeanor was, correct?
>
> *A.* Correct.

Defense counsel admitted that he opened the door to admission of the video with this line of questioning. Again, "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *Griffin*, 235 Mich App at 46.

Regardless, the probative value of the video's admission was not outweighed by the danger of unfair prejudice. Defendant admitted that he appeared calm throughout the interview depicted in the video, and explained the hand gestures he made. At trial, defendant used one hand to demonstrate for the jury how he pushed the knife into Watson's neck. However, when questioned further by the prosecutor, defendant clarified that he used two hands to push the knife into Watson's neck, as demonstrated in the video.[6] Thus, the jury did not interpret the gestures out of context, as defendant suggests, and the trial court did not err by admitting the video into evidence.

[6] Defendant appears calm throughout the video. Further, defendant does appear, in the video, to demonstrate how he held the knife when cutting into Watson's neck. He begins with two hands, and then switches to one as he seemingly pulls the knife through Watson's neck.

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IV. CRUEL AND UNUSUAL PUNISHMENT

Finally, defendant argues that the life sentence mandated by MCL 750.316(1), is unconstitutional both on its face and as applied, because it violates the prohibitions against cruel and unusual punishment in both the Michigan and United States Constitutions.

To preserve the argument that a sentence is unconstitutionally cruel or unusual, a defendant must advance the claim in the trial court. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Defendant failed to advance this argument in the trial court, so it is not preserved for appellate review.

In general, this Court reviews constitutional questions de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). " 'Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *Id.*, quoting *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009) (citation and quotation marks omitted). However, unpreserved issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

In *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976), the Michigan Supreme Court upheld the life sentence mandated by MCL 750.316, under both the United States and Michigan Constitutions. Defendant cites *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and scientific studies, in support of his argument that it is unconscionable to apply mandatory minimum sentences to all offenders, including those whose brains are still developing. But *Miller* only held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,' " *id.* at 2460, 2468, and defendant was over 18 at the time he killed Watson. As he points to no further legal authority directly supporting his argument, his sentence did not violate the United States and Michigan Constitutions.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN PERRY JORDAN,

Defendant-Appellant.

UNPUBLISHED
March 7, 2017

No. 328474
Wayne Circuit Court
LC No. 15-000968-01-FC

Before: SERVITTO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant, Alvin Perry Jordan, of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced defendant to life imprisonment without the possibility of parole for each murder conviction, and to 15 years to life imprisonment for the robbery conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing on his armed robbery conviction, and for correction of the judgment of sentence to specify one conviction for first-degree murder, supported by two different theories.

Defendant's convictions arise from the December 29, 2014 shooting death of Will Wright, who was shot and killed during a robbery after a drug sale. Testimony at trial indicated that Wright went to an apartment building to sell narcotic pills to Tanzania Corbin, the mother of defendant's girlfriend. After the sale, as Wright was exiting the building, he was approached by defendant. According to a witness, Lee Butler, the two men struggled over a gun. Defendant prevailed and Wright attempted to run away, but defendant shot him in the back. Defendant thereafter went through Wright's pockets and then left.

Both Corbin and Wright's friend, Nathan Lemons, who had accompanied Wright to the apartment building, denied that Wright was armed with a gun. Corbin also denied seeing defendant with a gun on the date of the offense, but admitted seeing him with a gun the day

[1] The jury acquitted defendant of an additional count of felonious assault.

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before. According to Corbin, after she heard two gunshots outside her apartment, defendant returned to her apartment and told her that he had shot Wright. Defendant removed his jacket, placed it in a closet, and then left. Shortly thereafter, the police arrived and seized a hooded sweatshirt during a search of Corbin's apartment. The sweatshirt contained blood, and DNA testing confirmed that the blood matched Wright's DNA. Defendant was also identified as a "possible contributor" to DNA taken from blood found under fingernail clippings from Wright's left hand.

I. SELF-DEFENSE

On appeal, we first address defendant's argument that defense counsel was ineffective for failing to request a jury instruction on self-defense, despite alluding to such a theory during his closing argument. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request an evidentiary hearing, our review of this issue is limited to errors apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's representation "fell below an objective standard of reasonableness"; and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland v Washington*, 466 US 668, 688-694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court presumes that defense counsel rendered effective assistance and exercised reasonable professional judgment in all significant decisions. *Vaughn*, 491 Mich at 670. Defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Because defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Whether to request a particular jury instruction can be a matter of trial strategy, and counsel is given wide discretion with regard to matters of strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Although defense counsel discussed Butler's testimony that he saw two men wrestling over a gun, counsel used this testimony, not to argue self-defense, but to argue that defendant could not be guilty of premeditated or felony-murder, and, at most, was guilty only of second-degree murder due to the lack of time to premeditate. Counsel also argued that the prosecution had not shown that defendant took anything from Wright. Counsel further argued that someone else, perhaps a bystander, could have taken the gun after the shooting.

We cannot conclude that counsel's decision to pursue this line of strategy, and to not request a self-defense instruction, was objectively unreasonable, particularly considering the lack of evidence supporting a legally viable claim of self-defense. A person is entitled to use deadly force in self-defense if the person honestly and reasonably believes "that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force[.]"

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People v Riddle, 467 Mich 116, 119; 649 NW2d 30 (2002). A person who acts as the initial aggressor cannot be found to have acted in justifiable self-defense. *People v Guajardo*, 300 Mich App 26, 35-36, 43; 832 NW2d 409 (2013). Apart from Butler's testimony describing an actual struggle for the weapon, very little other evidence supported a finding that defendant acted in self-defense. Indeed, the great body of evidence directly refuted such a theory. Although Butler described a struggle over the gun, he also stated that the gun was never in Wright's hands while the two men were wrestling. Moreover, Butler testified that after defendant prevailed in the struggle, Wright was trying to run away when defendant shot him. The physical evidence confirmed that Wright was shot in the back from a distance of more than two feet, at an angle consistent with someone bent over trying to run away. Lemons stated that Wright was unarmed, and Corbin similarly stated that she had never seen Wright with a gun. Lemons also testified that it was defendant who approached Wright as Wright was exiting the apartment building after the drug sale. No evidence indicated that Wright approached or attacked defendant, or acted as an initial aggressor in the confrontation with defendant. Defendant did not testify about his own version of the shooting, or offer any witnesses who were supportive of a self-defense claim.

Given this evidence, counsel's strategy to attack the element of premeditation and to argue the lack of evidence of an underlying felony to support the felony-murder charge was not objectively unreasonable. Moreover, to the extent that the testimony describing a struggle over the gun could be deemed minimally sufficient to support a self-defense instruction, considering the lack of other evidence supporting a self-defense claim, and the body of evidence refuting any legal claim of self-defense, it is not reasonably probable that the outcome of the trial would have been different if a self-defense instruction had been requested and given. Therefore, defendant was not prejudiced by counsel's failure to request the instruction.[2]

II. DEFENDANT'S LIFE-WITHOUT-PAROLE SENTENCES

Defendant argues that his mandatory sentence of life imprisonment without the possibility of parole violates the constitutional prohibition on cruel and unusual punishment considering his age, 18 years, at the time of the offense. Because defendant did not challenge the constitutionality of his mandatory life sentence in the trial court, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As defendant observes, in *Miller v Alabama*, 567 US ___ ; 132 S Ct 2455, 2460; 183 L Ed 2d 407 (2012), the United States Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " The Court explained the

[2] We also reject any suggestion that defense counsel improperly conceded defendant's guilt of second-degree murder during counsel's closing argument. Initially, we note that counsel specifically stated that he was not making such a claim. Regardless, the decision whether to concede guilt on a lesser is a matter of trial strategy, which this Court will not second-guess. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

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rationale behind drawing a distinction between 18-year-old offenders and their younger counterparts, stating:

> To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id.*, 132 S Ct at 2468.]

On appeal, defendant urges this Court to extend the holding in *Miller* to 18-year-old offenders. As discussed by this Court in *People v Skinner*, 312 Mich App 15, 23-27; 877 NW2d 482 (2015), the *Miller* decision represents a culmination of several decisions by the United States Supreme Court over the last 30 years that have gradually eased the automatic imposition of harsh sentencing for young offenders. As noted in *Skinner*, these decisions are based on the perceived differences between juvenile offenders and those who have reached the age of majority. *Id.* at 23-27. In contrast, defendant points only to a study noting that young adult brains share common risk-taking or impulse control features with those of juveniles. Defendant's study does support a position that, globally, mandatory life sentences for young offenders who have not reached full brain development is somehow unfair, or that the distinction between a 17-year-old and an 18-year-old is somehow "pure legal fiction." Any philosophical merit to defendant's position aside, defendant points to no legal authority to support his position. Accordingly, we decline defendant's invitation to extend *Miller* to 18-year-old offenders. The trial court did not violate the constitutional prohibition on cruel and unusual punishment by adhering to the demarcation between those who have attained the age of 18 years and those under 18 years of age, and by thereby imposing the mandatory sentence of life imprisonment without parole for defendant's conviction of first-degree murder.

We agree with defendant, however, that the trial court erred by entering a judgment of sentence reflecting two convictions and two life sentences for first-degree murder. Although the jury found defendant guilty of both first-degree premeditated murder and first-degree felony murder, because the two convictions arise from the death of a single victim, they violate the double jeopardy protection against multiple punishments for the same offense. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Accordingly, we remand for modification of the judgment of sentence to specify a single conviction of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.*; *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

III. DEFENDANT'S STANDARD 4 BRIEF

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Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. ADMISSIBILITY OF EVIDENCE

Defendant challenges the admission at trial of (1) photographs of him that were obtained from his cell phone, and (2) the hooded sweatshirt recovered by the police during their search of Corbin's apartment. Defendant argues that each of these items should have been excluded as evidence because they were obtained through an illegal search. Defendant acknowledges that he never challenged the admissibility of this evidence in the trial court, leaving the issues unpreserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. To constitute a "plain" error, the error must be "clear or obvious." *Id.* Defendant further argues, however, that defense counsel was ineffective for failing to seek suppression of this evidence. Because defendant did not raise an ineffective assistance of counsel claim in an appropriate motion in the trial court, review of that issue is limited to errors apparent from the record. *Snider*, 239 Mich App at 423.

"In general, searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se." *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014). Unless an exception applies, evidence that has been seized in violation of the constitutional prohibition against unreasonable searches and seizures must be excluded from trial. *Id.* at 537-538; *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009).

Defendant correctly asserts that a warrant is generally required before the police may lawfully search a suspect's phone. *Riley v California*, ___ US ___; 134 S Ct 2473, 2494-2495; 189 L Ed 2d 430 (2014); *People v Gingrich*, 307 Mich App 656, 665-666; 862 NW2d 432 (2014). Although defendant argues that the police unlawfully searched his phone, he points to no evidence addressing the circumstances under which the police obtained the photos or other data from his phone. The lower court record discloses that plaintiff filed a pretrial motion to admit photos obtained from defendant's cell phone. Plaintiff's brief in support of that motion specifically states that "[a] search warrant was executed on the contents of Defendant's cell phone that resulted in 692 images being recovered." Defendant never challenged the veracity of that statement, and he has presented nothing on appeal to indicate that this assertion is false or inaccurate, that the referenced warrant was somehow defective, or to establish any other irregularity. Because the record indicates that the cell phone photos were obtained pursuant to a search warrant, and defendant has not presented anything to suggest otherwise, we conclude that defendant has failed to demonstrate a plain error related to the seizure or admission of the cell phone photographs. Furthermore, absent any basis for concluding that the cell phone photos were illegally obtained, defendant's related ineffective assistance of counsel claim cannot succeed. Counsel is not required to raise a meritless issue. *People v Moorer*, 262 Mich App 64, 76, 683 NW2d 736 (2004).

Defendant also challenges the admission of the hooded sweatshirt that the police recovered during a search of Corbin's home shortly after the offense. "One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent." *People v Borchard-Ruhland*, 460 Mich 278, 294, 597 NW2d 1 (1999). "The

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consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001) (quotation omitted). Defendant lacks standing to assert this issue. "The right to be free from unreasonable searches and seizures is personal, and the right cannot be invoked by a third party." *People v Mahdi*, ___ Mich App ___, ___; ___ NW2d ___ (2016); slip op at 5. Therefore, defense counsel's stipulation to the sweatshirt's admission was not ineffective assistance and we deny defendant's request for a remand on this issue.

B. JURY VERDICT FORM

Defendant next argues that the jury verdict form was defective because it did not allow the jury to choose a "general not guilty" option in which it could find defendant not guilty of all charges. Defendant acknowledges that there was no objection to the verdict form at trial. Thus, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. We find no merit to this issue.

Defendant correctly observes that "a criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *People v Wade*, 283 Mich App 462, 467; 771 NW2d 447, lv den 486 Mich 909 (2009). However, this is not what occurred here. The jury verdict form used at trial presented the jury with the following options for count 1, first-degree premeditated murder:

> ____ NOT GUILTY
>
> OR
>
> ____ GUILTY OF HOMICIDE –MURDER FIRST DEGREE-PREMEDITATED
>
> OR
>
> ____ GUILTY OF THE LESS SERIOUS OFFENSE OF HOMICIDE- MURDER SECOND DEGREE [Jury verdict form, p 1.]

Similar options, including a specific "not guilty" option, were provided for each of the other charged offenses. The verdict form clearly provided the jury with the option of finding defendant "not guilty" of each charged offense. Thus, there was no error, plain or otherwise. In addition, because defense counsel is not required to raise a meritless issue, *Moorer*, 262 Mich App at 76, counsel was not ineffective for failing to object to the verdict form.

C. ARMED ROBBERY SENTENCE

Defendant also argues, and we agree, that the trial court erred when it imposed a sentence of 15 years to life for defendant's armed robbery conviction. The trial court's sentence violates MCL 769.9(2), which provides that "[t]he court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." A violation of MCL 769.9(2) renders a sentence wholly invalid and requires

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resentencing de novo. *People v Parish*, 282 Mich App 106, 108; 761 NW2d 441 (2009). Accordingly, we vacate defendant's invalid sentence for armed robbery and remand for resentencing on that offense.

We affirm defendant's convictions, but vacate his sentence for armed robbery and remand for resentencing on that offense, and remand for correction of the judgment of sentence to specify a single conviction for first-degree murder, supported by two different theories. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAJEON LAVELLE FRANKLIN,

Defendant-Appellant.

UNPUBLISHED
April 7, 2016

No. 325551
Washtenaw Circuit Court
LC No. 14-000181-FC

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), two counts of first-degree home invasion, MCL 750.110a(2), conspiracy to commit second-degree home invasion, MCL 750.110a(3), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for his role in a robbery spree and the murder of University of Michigan medical student, Paul DeWolf. Defendant challenges the sufficiency of the evidence supporting that he acted with malice in killing DeWolf, the admission of evidence that defendant possessed a gun on other occasions, and the length of his sentence as cruel and unusual punishment. Although the trial court improperly admitted one unfairly prejudicial photograph, this error did not likely alter the outcome of the trial. We therefore affirm defendant's convictions and sentences.

I. BACKGROUND

On the night of July 23, 2013, defendant, Joei Jordan, and Shaquille Jones drove from Ypsilanti to an Ann Arbor neighborhood where the homes were divided into smaller units for rent by students. The trio planned to break into houses to steal small, valuable items. The men entered 210 North Ingalls Street through an open window and stole a MacBook laptop and a purse. They then entered the neighboring home, 220 North Ingalls Street, a medical society house that rented individual bedrooms to students. While in the basement stealing a video game system, the men heard one of the bedroom doors open and the resident go inside. Despite knowing that someone was present, defendant and his accomplices decided to enter that bedroom.

When the trio entered the dark bedroom, DeWolf slowly stood up from his bed and repeatedly asked, "Who is there?" No one responded. Defendant moved toward DeWolf holding a handgun in one hand aiming it at the victim. DeWolf reached for defendant or the gun,

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and defendant pulled the gun back. Defendant then hit DeWolf with an overhead swing of the gun and the gun discharged. Jones, Jordan, and defendant ran out of the residence. Defendant told Jones and Jordan that he shot DeWolf because he thought DeWolf had a knife or was grabbing for the gun.

DeWolf died from his gunshot wound. The medical evidence supported that the gun fired while it was sweeping downward. The weapon was in close range to DeWolf's clavicle and the bullet caused severe damage as it travelled downward through his torso and out his middle back. Defendant and his accomplices were apprehended after officers traced the stolen items they sold and secured fingerprint evidence from the two robbery scenes. Officers also discovered dots of DeWolf's blood on the shoes worn by defendant that night.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecution presented insufficient evidence that he acted with the necessary malice to support his felony murder conviction. We review such challenges de novo, viewing the evidence "in the light most favorable to the prosecution" to determine whether a rational trier of fact "could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007). Our review is deferential to the jury's verdict. We will not interfere with the jury's role of determining the weight of the evidence or assessing the witnesses' credibility. *Id.* at 419. "Conflicts in the evidence must be resolved in favor of the prosecution," and "[c]ircumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

To convict a defendant of felony murder, the prosecution must establish:

> (1) the killing of a human being, (2) *with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, [i.e. malice]* (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). [*People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009) (emphasis added, citations omitted).]

Contrary to defendant's protestations, the prosecution presented sufficient evidence to establish that he acted with malice. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). Actual intent to kill is not required, "only the intent to do an act that is in obvious disregard of life-endangering consequences." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Given the difficulty of proving a defendant's state of mind, "minimal circumstantial evidence" will suffice. *People v Stevens*, 306 Mich App 620, 629; 858 NW2d 98 (2014). The intent to do great bodily harm may be inferred from the level of physical force and violence employed, the use of a deadly weapon, or the decision to set into motion actions likely to cause death or great bodily harm. See *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999); *People v Dillard*, 303 Mich App 372, 377; 845 NW2d 518 (2013); *People v James*, 267 Mich App 675, 677-678; 705 NW2d 724 (2005).

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Viewing the evidence in the light most favorable to the prosecution, the jury could conclude beyond a reasonable doubt that defendant acted with malice. Defendant set out on his robbery spree armed with a loaded handgun. He entered a dark bedroom in the middle of the night knowing that someone was inside and that any robbery would likely involve an element of force. When confronted by the sleepy and surprised resident, defendant decided to raise his loaded handgun overhead and strike the victim with a downward swing. The jury could certainly view these events as constituting "wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Roper*, 286 Mich App at 84.

Defendant alternatively asserts that his felony murder conviction should have been reduced to second-degree murder. Pursuant to MCL 750.316, first-degree murder includes murder committed in the course of a felony and premeditated murder. "All other murders are murders in the second degree." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). The trial court instructed the jury that it could convict defendant of second-degree murder as a lesser included offense of the felony murder charge; the jury declined to do so. We may not interfere with that judgment. *Odom*, 276 Mich App at 419. Moreover, second-degree murder also includes an element of malice and the lack of such intent would not support conviction of this lesser offense. *People v Reese*, 491 Mich 127, 142-143; 815 NW2d 85 (2012).

III. "OTHER ACTS" EVIDENCE

Defendant challenges the admissibility of certain evidence under MRE 404(b). The challenged evidence includes: (1) a 2009 photograph posted by defendant on Facebook depicting him holding a handgun, (2) the testimony of Dave Pearson and Danielle Hugan that defendant showed them a gun in the summer of 2013, and (3) a text message exchange in which defendant agreed to purchase a gun from Ramone Dabney. Defendant preserved his challenge to the admission of the Facebook photograph by raising a contemporaneous objection. We review for an abuse of discretion a trial court's decision to admit evidence over a party's objection. *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007). We review the remaining unpreserved challenges for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MRE 404(b) governs the admission of other act evidence. MRE 404(b)(1) states:

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

When reviewing whether evidence was properly admitted under MRE 404(b), we must consider (1) whether the evidence was "offered for a proper purpose under Rule 404(b)"; (2) whether the evidence was "relevant under Rule 402 as enforced through Rule 104(b)"; (3) whether the evidence's probative value was substantially outweighed by unfair prejudice as provided in MRE 403; and (4) whether the trial court provided "a limiting instruction to the

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jury." *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The prosecution contends that the witness accounts of personally observing defendant with a handgun around the time of the crime and the text message string regarding the purchase of a handgun before the crime were not precluded by MRE 404(b). This evidence was not offered to establish defendant's propensity to commit the crime, but rather to prove that defendant owned or had access to a handgun around that time, the prosecution asserts. Possession of a handgun was an element of an offense placed before the jury.

"[I]f the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character," as in this case, "Rule 404(b) is not implicated." *Id.* at 64. Indeed, "by its plain terms, MRE 404(b) only applies to evidence of crimes, wrongs, or acts *'other' than the 'conduct at issue in the case'* that risks an impermissible character-to-conduct inference." *People v Jackson*, 498 Mich 246, 262; 869 NW2d 253 (2015) (emphasis added). Therefore, "acts comprised by or directly evidencing the 'conduct at issue' are not subject to scrutiny under MRE 404(b)." *Id.* Importantly, "[e]vidence of a *defendant's possession of a weapon of the kind used in the offense* with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989) (emphasis added).

Jones testified that defendant carried a black, semi-automatic handgun on the night of the offense and that defendant used this gun to shoot DeWolf. The text message exchange evidenced that before the night of the current offense, defendant intended to (and apparently did) purchase a gun matching Jones's description of the murder weapon. The text message exchange noted that the weapon contained hollow point bullets, and investigating officers found a hollow point bullet jacket fragment at the murder scene. Expert testimony established that the weapon in the text message photograph was of a type that could have fired the fatal bullet. The text message exchange was therefore direct evidence that defendant committed the offense, *Hall*, 433 Mich at 580-581, and its admission did not implicate MRE 404(b). *VanderVliet*, 444 Mich at 64.

Similarly, evidence that Hugan and Pearce saw defendant in the possession of a handgun matching the description of the murder weapon, close in time to the commission of the offense, was "direct, relevant evidence of his commission of [the] offense." *Hall*, 433 Mich at 580-581. This evidence tended to establish that defendant had access to the weapon used in the murder. As this evidence was properly admitted, defendant cannot establish plain error necessitating relief.

However, the trial court improperly admitted a 2009 photograph depicting defendant holding a handgun. The evidence was offered for the improper purpose of establishing that defendant was prone to carry and use guns. Although a person's propensity to carry guns would certainly be relevant to establish his guilt, MRE 404(b) protects against this type of implication. And this evidence was overly prejudicial.

Pursuant to *VanderVliet*, 444 Mich at 75, before other acts evidence may be admitted, the trial court must consider "whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts

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appropriate for making decision of this kind under [MRE] 403." (Quotation marks and citation omitted.) "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford,* 458 Mich 376, 398; 582 NW2d 785 (1998). Our Supreme Court provided an illustrative list of considerations when determining whether evidence is unfairly prejudicial, including "the temporal proximity of the other acts evidence to the charged crime" and "the lack of reliability of the evidence supporting the occurrence of the other acts." *People v Watkins,* 491 Mich 450, 487-488; 818 NW2d 296 (2012).

The subject photograph was taken years before the crimes at issue, when defendant was only 15 years old. Accordingly, there is no "temporal proximity" between the evidence and the offense. Although the weapon in the photograph appears to be a handgun, no evidence supports any other similarity to the murder weapon. In fact, there is no way to determine whether the weapon in the photograph is even real, rather than fake. Accordingly, the photograph was irrelevant to prove that defendant actually possessed the murder weapon. Moreover, the photograph depicts defendant aiming the weapon at the photographer in a mock menacing fashion, placing him in an extremely negative light. Therefore, even if the evidence was otherwise admissible, it would be unduly prejudicial and the trial court abused its discretion in admitting it.

However, reversal is not warranted when a trial error is harmless. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Here, overwhelming evidence supported defendant's guilt beyond a reasonable doubt. The prosecution presented eyewitness testimony and DNA evidence placing defendant at the scene of the crime. Defendant's cellular telephone records also placed him in the area that night. Jones described the night's events in detail, including defendant's murder of DeWolf and defendant's proffered explanation for his actions. Accordingly, defendant is not entitled to relief.

IV. CRUEL AND UNUSUAL PUNISHMENT

The trial court sentenced defendant to life imprisonment without the possibility of parole for his felony murder conviction. Defendant contends that this sentence violated his right to be free from cruel and unusual punishment and to due process of law given his young age at the time he committed his offenses. We review such unpreserved constitutional claims for plain error. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013).

Looking to the binding precedent in this area, defendant's claim is meritless. "[M]andatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller v Alabama*, ___ US ___; 132 S Ct 2455, 2460; 183 L Ed 2d 407 (2012) (emphasis added). Defendant was almost 21 years old at the time of his offenses. As defendant does not fall within the protected class described in *Miller*, its analysis is inapplicable. *Id.* Defendant also cannot look to Michigan law for protection. Michigan codified *Miller*'s individualized sentencing requirement in MCL 769.25, but the statute also only applies to those defendants who were under the age of 18 when they committed their crimes. And the Legislature mandated the sentence of life without the possibility of parole for adult offenders who commit the crime of felony murder. MCL 750.316(1). "Legislatively mandated sentences are presumptively proportional and

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presumptively valid." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). "[A] proportionate sentence does not constitute cruel or unusual punishment." *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

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