STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 266714 Montcalm Circuit Court
TRAVIS MICHAEL UNDERWOOD, Defendant-Appellant.	LC No. 04-001212-FC

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant, Travis Michael Underwood, appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), second-degree home invasion, MCL 750.110(a)(3), larceny in a building, MCL 750.360, and unlawfully driving away an automobile (UDAA), MCL 750.413, arising from the bludgeoning and strangulation death of a seventy-three-year-old woman, Kathryn Dyer. The trial court sentenced defendant to mandatory life without parole for the first-degree murder conviction supported by the two alternate theories of premeditated murder and felony murder, vacated the sentences for the crimes of home invasion and larceny in a building, and three to five years' imprisonment for the UDAA conviction.[1] We affirm in part, vacate in part, and remand.

I

On April 26, 2001, the victim, Kathryn Dyer, a seventy-three-year-old petite woman suffering from severe arthritis, attended a church program from approximately 7:00 pm to 9:15 pm. Dyer left church at approximately 9:30 pm and dropped off a fellow churchgoer on her way

[1] The Supreme Court of Michigan has considered the double jeopardy implications of this precise situation where a defendant committed a felony that resulted in the death of a single victim. *People v Williams II*, 475 Mich 101, 103; 715 NW2d 24 (2006). Like here, if the defendant is convicted of first-degree premeditated murder, first-degree felony murder, and the underlying felony, the trial court may indicate one conviction and sentence supported by the two theories of premeditated murder and felony murder, but must vacate the conviction for the underlying felony. *Id.*; see also *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

home. It is estimated that Dyer arrived at her home in Edmore, Michigan between approximately 9:45 and 10:00 pm. The next morning, Dyer's children were concerned because Dyer was not answering her phone. Dyer's son, Ken Dyer, drove to his mother's house to check on her sometime between 8:00 am and 8:30 am. When he arrived he noticed that his mother's car, a Pontiac Grand Prix with distinctive pinstripes, was missing. He then entered her home and discovered his mother's dead body laying half way in the hallway and half in her bedroom. The house was small and the hallway area was a small area. Dyer's purse, songbook, and bible, that she had taken to church with her, were found lying near her body.

Testimony from a forensic pathologist at trial indicated that Dyer died from a combination of head trauma and manual strangulation. Dyer was forcefully hit with a blunt object between a minimum of 11 times and a maximum of 20 to 25 times. She was also manually strangled, meaning hands were applied around her neck and squeezed for a period of time; death was not immediate. The evidence showed that the head injuries and the manual strangulation occurred while Dyer was still alive. Further, there was extensive bruising on her hands and wrists consistent with defensive wounds.

Testimony at trial showed that defendant, a twenty-one-year-old, and two other men, cousins, Anthony and Aaron Chapman,[2] had information from an overheard conversation that Dyer had a prescription for Oxycontin and knew where she lived. Defendant and the Chapman's knew that Dyer was an elderly woman and had some information about her schedule. They went to her house on April 26, 2001, a Thursday night, expecting her not to be home with the intent break in and steal prescription drugs, money, or other valuables. They broke into her home through a window bringing with them a pipe wrench. While they were searching through the house, Dyer came home and startled them. They beat her with the pipe wrench and strangled her. They cleaned the house before they left in an attempt to rid the house of any evidence. They then took her car keys and stole Dyer's car. They drove around for awhile before they started it on fire using gasoline to get rid of evidence and then abandoned the car.

II

Defendant first argues that there was insufficient evidence to sustain his premeditated murder conviction, it must be reversed because it is against the great weight of the evidence, and the trial court erred when it failed to grant defendant's motion for directed verdict. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003). "The test to determine whether a verdict is against the great weight of the evidence 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 Musser*, 259 Mich App 215, 218-219; 673 NW2d 800

[2] Anthony and Aaron Chapman were tried and convicted separately from defendant. Both have filed appeals in this Court that are currently pending at docket numbers 266736 and 265064, respectively.

(2003). "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Defendant bases his claims on his assertions that no physical evidence implicated him in the crimes, a lack of credible witness testimony, and, insufficient evidence of "premeditated and deliberate murder."

A. Physical Evidence

Regarding the lack of physical evidence found at the house and the car, clearly, the prosecution presented evidence that defendant and the Chapmans cleaned up the house after committing the murder in order to cover up any evidence that might be left behind before leaving the victim's house. The prosecution also presented evidence that defendant and the Chapmans used an accelerant, namely gasoline, to burn the victim's vehicle specifically to ensure they left no evidence behind when they abandoned it. In light of the fact that circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of the elements of the crime of first-degree, premeditated murder, defendant's argument fails. *People v Marsack*, 231 Mich App 364, 371; 586 NW2d 234 (1998).

B. Credibility of Witness Testimony

Defendant also challenges the credibility of testimony of several prosecution witnesses who testified regarding statements that either the Chapmans or defendant made to them about their involvement in the crime. The prosecution presented evidence about the crimes through the testimony of many, many witnesses. After reviewing the record, indeed, some of the witness testimony was inconsistent, thus calling into question witness credibility. However, a prosecutor "need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide,'" *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Konrad*, 449 Mich 263, 273 n. 6; 536 NW2d 517 (1995), and factual conflicts are to be viewed in a light favorable to the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Because the issue of credibility was rightfully determined by the jury, we find no basis for disturbing the jury verdict on this ground. *Id*. at 561.

C. Elements of First-Degree Premeditated Murder and First-Degree Felony Murder

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *Marsack*, *supra* at 370. Premeditation is an essential element of first-degree premeditated murder. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both "characterize a thought process undisturbed by hot blood." *Id*. "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a 'second look' at his

contemplated actions." *Id*.; see also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing itself, and the defendant's conduct before and after the killing. *Id*.; *Furman, supra* at 308. Premeditation can also be inferred from the type of weapon used and the location of the wounds. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

In this case, there was evidence presented that defendant and the Chapmans had information that Dyer had a prescription for Oxycontin, knew where she lived, that she was elderly, and planned to break into her home to steal prescription drugs, money, or any other valuables they could find while she was not home. Defendant argues that there was no intent to murder because the perpetrators were surprised when Dyer arrived home. But, the victim died from a combination of manual strangulation and multiple blows to the head with a blunt object. Although manual strangulation alone is not sufficient evidence of premeditation, "evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.'" *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999), quoting *Furman, supra* at 308. There was also evidence that the victim had defensive wounds, which also can be used as evidence of premeditation. *Id*. at 733. Defendant and the Chapmans cleaned up the scene and then fled the scene of the crime in the victim's car. This circumstantial evidence was sufficient for the jury to find defendant guilty of first-degree premeditated murder beyond a reasonable doubt.

In any event, although defendant does not challenge it specifically, the evidence presented was also sufficient for a reasonable jury to conclude that defendant committed first-degree felony murder. The elements of first-degree felony murder are (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b). *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001). The underlying felony involved in this case is home invasion in the second degree, a felony enumerated in MCL 750.316(1)(b). The elements of second-degree home invasion are as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree. [MCL 750 .110a(3).]

When viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to prove all of the elements of first-degree felony murder premised on second-degree home invasion. The evidence was sufficient for a reasonable jury to conclude that defendant acted with malice when he took part in the beating and strangulation death of Dyer. Malice can be inferred from the circumstances surrounding the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Forensic pathology evidence showed that Dyer was forcefully hit in the head with a blunt object at least 11 times, but possibly as many as 20 to 25 times. Further, she was manually strangled. Dyer died from the combination of injuries. Because of the nature and extent of Dyer's injuries, we conclude that a reasonable jury could

infer that defendant acted with malice, i.e., that defendant intended 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. *Nowack, supra* at 401. We also conclude that a reasonable jury could infer from the evidence that defendant committed second-degree home invasion, i.e., that defendant broke into Dyer's home and entered the dwelling without permission and, while he was present in the dwelling committed a felony, larceny, or assault when he and the Chapmans beat and strangled Dyer to death, took her car keys, and fled the scene in her vehicle. MCL 750.110a(3). The evidence presented was sufficient for a reasonable jury to conclude that defendant committed first-degree felony murder premised on second-degree home invasion.

D. Great Weight of the Evidence and Directed Verdict

Defendant's arguments that the verdict was against the great weight of the evidence and that the trial court erred when it denied defendant's motion for directed verdict do not add anything to his argument regarding the sufficiency of the evidence. Thus, defendant has failed to "establish that an innocent person had been found guilty, or that the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to permit the verdict to stand," *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998), and his argument that the verdict was against the great weight of the evidence fails. Also, after de novo review, we have determined that "the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Aldrich, supra* at 122. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict. We therefore decline to disturb defendant's conviction for first-degree murder, supported by the two alternate theories of premeditated murder and felony murder.

III

Defendant next argues that the trial court violated defendant's constitutional right to confrontation, due process, and MRE 403 when it allowed statements made by the Chapmans to friends and acquaintances in at trial as evidence. Defendant points to the testimony of nine witnesses that included information about Anthony or Aaron Chapman's admissions about their involvement in the crime as well as information about defendant's involvement in the crime. The admissibility of evidence is within the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). In general, an abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A preliminary question of law related to the admissibility of evidence is reviewed de novo. *McDaniel, supra*.

MRE 802 prohibits the admission of hearsay statements as substantive evidence unless an exception applies to the statements. One exception is MRE 804(b)(3) that provides that, when a declarant is unavailable as a witness, a statement against interest is not excluded by the hearsay rule. MRE 804(b)(3) provides, in pertinent part:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil

> or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Under MRE 804(b)(3), the portions of the Chapmans' statements to the nine witnesses—including relatives, friends, and acquaintance—that implicate themselves in the murder were against both Anthony and Aaron Chapman's penal interests, and tended to subject them to criminal liability such that a reasonable person in the Chapmans' positions would not have said what they said to the witness unless true and, thus, were admissible under the exception.

Although admissible under the rules of evidence, we must determine if the admission of the statements violated defendant's Sixth Amendment right of confrontation, US Const, Am VI; Const 1963, art 1, § 20. The admission of hearsay statements under MRE 804(b)(3) "does not violate the Confrontation Clause if the prosecutor establishes that the declarant is unavailable as a witness and that the statement bears adequate indicia of reliability or falls within a firmly rooted hearsay exception." *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000), citing *People v Poole*, 444 Mich 151, 163; 506 NW2d 505 (1993). Identical to the case at bar, in *Poole*, *supra*, the issue was "whether a declarant's noncustodial, out-of-court, unsworn-to statement, voluntarily made at the declarant's initiation to someone other than a law enforcement officer, inculpating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial pursuant to MRE 804(b)(3)." *Poole*, *supra* at 153-154. The *Poole Court* answered the question in the affirmative, and the hearsay was admitted through the testimony of an acquaintance—not a government agent. *Id*.

Here, it is undisputed that both Anthony and Aaron Chapman were unavailable as witnesses since they were codefendants charged in the same offense as defendant and tried separately. In *Poole, supra* at 163-164, our Supreme Court declined to declare MRE 804(b)(3) a firmly rooted hearsay exception and set forth a framework to conduct the reliability analysis:

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates-that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Id*. at 165.]

In this case, the trial court properly determined that the admission of the Chapmans' statements to the nine witnesses as substantive evidence against defendant did not violate the Confrontation Clause considering the circumstances surrounding the making of the statements and the contents of the statements. After reviewing the record, we are not persuaded that the trial court abused its discretion when it admitted the statements finding that the Chapmans' statements were (1) voluntary, (2) made to relatives, friends, and acquaintances—individuals with whom the Chapmans would likely speak the truth, (3) uttered spontaneously on their own initiative and without prompting or inquiry by the witnesses, (4) did not shift the blame, but instead implicated themselves as well as defendant during the admissions, (5) were not made for any apparent beneficial purpose, and (6) were not motivated by any apparent reason to lie or distort the truth. The record does not contain any other facts or circumstances that would weigh against the reliability of the Chapmans' statements to the witnesses. In sum, we conclude that the challenged hearsay testimony was admissible under MRE 804(b)(3) and was sufficiently reliable to satisfy the Confrontation Clause, therefore, the trial court properly admitted the testimony. Also, for these reasons, defendant has not shown a violation of his due process rights.

Because of our resolution of the foregoing regarding "noncustodial evidence" and the application of the reliability test enunciated in *Poole, supra*, we need not address the prosecutor's alternate argument for affirmation regarding "nontestimonial evidence"[3] and the application of *Whorton v Bockting*, ___ US ___; 127 S Ct 1173; 167 L Ed 2d 1 (2007); *Davis v Washington*, 547 US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006); and *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

IV

[3] Pursuant to *Davis v Washington*, 547 US ___; 126 S Ct 2266, 2273-2274; 165 L Ed 224 (2006):

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Supreme Court held in *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), that state hearsay rules could govern the admissibility of nontestimonial hearsay without offending the Confrontation Clause, US Const, Am VI. Thus, the Confrontation Clause does not bar testimony unless the statements of the declarant were "testimonial."

Defendant next argues that the trial court improperly instructed the jury because it denied his request to instruct the jury on manslaughter. We review for an abuse of discretion the trial court's determination whether a requested jury instruction applies to the facts of this case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Even if there is error, reversal is only warranted if defendant can establish that the error caused a miscarriage of justice, which means that it is more likely than not that the error was outcome determinative and the error undermined the reliability of the verdict. *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

Both voluntary and involuntary manslaughter are necessarily included lesser offenses of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 540-541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541. To show voluntary manslaughter, defendant was required to show that he killed in the heat of passion, that the passion was caused by adequate provocation, and that there was no lapse of time during which a reasonable person in defendant's position could have controlled his passions. *Id*. at 535. The degree of provocation that defendant was required to demonstrate to mitigate his offense from murder to manslaughter is the degree of provocation that would cause defendant to act out of passion rather than reason, and that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

In support of his argument, defendant merely argues that there was testimony that defendant and the Chapmans were "surprised" by Dyer when she arrived home. All of the evidence presented at trial indicated that defendant and the Chapmans bludgeoned and strangled Dyer completely without provocation simply because she arrived home while they were inside her residence. Defendant did not present any testimony indicating that the victim—a seventy-three-year-old petite woman suffering from severe arthritis—antagonized, provoked, or instigated three men to beat and strangle her to death. On this record, the trial court properly denied defendant's request for an instruction on voluntary manslaughter because a rational view of the evidence did not support the instruction.

Also, on these facts, an involuntary manslaughter instruction was not warranted because there was no evidence suggesting that Dyer's killing was unintentional, or occurred under circumstances involving (1) the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; (2) the commission of some lawful act, negligently performed; or (3) the negligent omission to perform a legal duty. *Mendoza, supra* at 536.

V

Defendant next contends that the trial court erred when it denied defendant's motion for dismissal of the charges due to a violation of the 180-day rule. We review a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A trial court abuses its discretion when it fails to select a principled outcome. *Babcock, supra* at 269.

Michigan's 180-day rule, MCL 780.131(1) provides in part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or compliant setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

If the jurisdiction fails to bring an incarcerated defendant to trial within the 180-day period, the court is divested of jurisdiction and the charge must be dismissed. MCL 780.133; MCR 6.004(D)(2); *People v Williams*, 475 Mich 245, 252; 716 NW2d 208 (2006).

The 180-day period under the Michigan statute begins on the day after the prosecutor receives notice from the Michigan Department of Corrections (MDOC) that the defendant is incarcerated and awaiting trial on pending charges. *Williams, supra* at 256-257 n 4. The requirement is specific. The notice must be delivered to the prosecutor. *Id*. at 256; MCL 780.131(1). The *Williams* Court explicitly noted that MCR 6.004 was amended January 1, 2006, to conform to the statute. *Id*. at 258. That amendment deleted language that the 180 days began to run when the MDOC knows or has reason to know of pending charges. MCR 6.004. Thus, the only action that begins the 180-day period is the delivery of notice to the prosecutor, unless the statutory exceptions apply.[4] *Id*. at 254. Here, defendant admits on appeal that the Department of Corrections did not provide the proper notice to the prosecutor as required by the statute admitting that "[i]t is certainly true that in this particular case the Department of Corrections did not give the notice required by the statute." Hence, under *Williams*, the 180-day period never ran, and there is no violation of the statute. But our Supreme Court gave *Williams* only limited retroactive effect. The prosecutor admits in its brief on appeal that *Williams* is not controlling here because although the present case was pending on appeal at the time *Williams* was decided, defendant did not raise the precise claim decided in *Williams*.

Pre-*Williams, supra*, the 180-day rule, set forth in MCL 780.131(1), did not require that the defendant's trial commence within the 180-day period. *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987). Rather, the prosecution is required to take good faith action during the 180-day period, and promptly proceed in readying the case for trial. *Id*. at 505. If the prosecution takes such good faith action, the trial court will not lose jurisdiction over the defendant unless the initial action is followed by inexcusable delay demonstrating an intent not to bring the case to trial promptly. *Id*. The record here shows that despite the lack of formal notice, the prosecutor indeed made a good faith effort to bring defendant to trial within the 180-day period.

[4] The statutory exceptions are when an inmate has committed an offense while incarcerated in a state correctional facility, and when an inmate has committed an offense after escaping from the correctional facility. MCL 780.131(2)(a) and (b). Neither exception applies in this case.

Defendant admits in his brief on appeal that he specifically requested 120 days of discovery to prepare for trial. Also, the record shows that the prosecution was ready to try defendant together with Anthony and Aaron Chapman, but defendant's trial attorney had a conflict that precluded his handling of defendant's case and therefore the trial court appointed a new attorney, severed the trial, and set a new trial date allowing for time for the newly appointed attorney to prepare for trial. Under these circumstances, we agree with the trial court that any delays resulting from defendant's own requests were not the fault of the prosecutor. Because the delay in bringing defendant to trial was not an inexcusable delay attributable to the prosecution that evidenced an intent not to promptly bring defendant to trial, there was no violation of the 180-day rule. *Bradshaw, supra* at 505. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to dismiss. *Adams, supra* at 132.

VI

Defendant next argues that he was denied the effective assistance of counsel at trial. Defendant specifically argues that his trial counsel was constitutionally ineffective for failing to call two witnesses, Tonya Totten and Joyce Mangus, in an attempt to impeach the testimony of prosecution witness, Kyle Chapman. To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or for a *Ginther*[5] hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Following trial, defendant moved for a new trial. Thus, the claims of ineffective assistance raised by defendant in his motion for a new trial are preserved. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Nonetheless, because the trial court did not hold an evidentiary hearing, this Court's review is limited to the facts on the record. *Id.*

"To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, [he] was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must overcome a strong presumption that his counsel's assistance constituted sound trial strategy. *Sabin, supra* at 659. "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *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 Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

The record shows that Joyce Mangus did testify at trial as a prosecution witness and defense counsel had the opportunity to cross-examine her, which he did. Kyle Chapman also testified at trial and specifically denied that he had told Mangus that he had lied at Anthony and Aaron Chapman's trial—that the Chapmans had not been to his house and that he never helped burn Dyer's car and that he said what he said to "protect his a--." Mangus testified at trial that

[5] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

since Dyer's death, her husband had died and she began dating Kyle Chapman. The decision to recall Mangus as a witness fell within the wide range of reasonable professional assistance. Further, in light of all of the evidence that defendant and the Chapmans committed the charged crimes, this evidence would not have affected the outcome of the trial. This Court will not substitute its judgment for that of counsel in matters of trial strategy.

Regarding Tonya Totten, there is nothing in the record to indicate how the proposed witnesses would have testified. Defendant has the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Limiting our review to the record, we are unable to conclude that defendant was denied a substantial defense when his counsel decided not to call Totten. Concerning defense counsel's decision regarding both Mangus and Totten, defendant has not overcome the strong presumption that his counsel's assistance constituted sound trial strategy, and therefore, we find no error. *Sabin, supra* at 659.

VII

Defendant contends that the trial court abused its discretion in denying his motion for a new trial on the basis of newly discovered evidence. We review for an abuse of discretion a trial court's decision whether to grant a new trial on the basis of newly discovered evidence. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not cumulative; (3) defendant could not, with reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Id*. at 692; MCR 2.611(A)(1)(f).

Defendant states specifically that the newly discovered evidence is a police report wherein Wayne Scott Forrester stated that Kyle Chapman had made statements to him that "Kyle [Chapman] did not tell the truth about Underwood's involvement." "Generally, . . . where the new evidence is useful only to impeach a witness, it is deemed merely cumulative." *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). Further, "[n]ewly discovered evidence is not ground[s] for a new trial where it would merely be used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993); *People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988). However, the discovery that testimony introduced at trial was perjured may be grounds for a new trial. *Barbara, supra* at 363.

First, defendant should have, through the exercise of reasonable diligence, been able to present this evidence at trial. The police report referenced is dated July 24, 2002 with a supplemental date of August 1, 2002. Clearly this evidence was discoverable before trial that commenced in this case in September 2005. Second, the new evidence offered by defendant would likely have made no difference in the outcome of his trial. Forrester's statement in the police report that Kyle falsely stated that defendant was involved in the murder does not undermine the prosecution's evidence presented at trial that defendant committed the crimes with the Chapmans. A review of Kyle Chapman's testimony shows that he testified about defendant's possession of Dyer's stolen car and its burning and abandonment—events that occurred after Dyer's murder. Kyle Chapman's testimony never directly linked defendant to the actual beating and strangulation of Dyer in her home. Thus, the newly discovered evidence would not have made a different result probable on retrial. Finally, this "[n]ewly discovered evidence is not

ground[s] for a new trial where it would merely be used for impeachment purposes." *Davis, supra* at 516; *Bradshaw, supra* at 567.

In sum, defendant failed to establish that he could not have, through the exercise of reasonable diligence, been able to present this evidence at trial. He also did not show that the introduction of such evidence would likely lead to his acquittal on retrial or that the evidence was not merely cumulative. Consequently, the trial court did not abuse its discretion in denying his motion for a new trial.

VIII

In his Standard 4[6] brief on appeal, defendant contends that the trial court abused its discretion in admitting photographs of the victim's autopsy. The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). The proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id*.; MRE 403.

The autopsy photographs were referenced during the forensic pathologist's testimony and were instructive in depicting the nature and extent of Dyer's injuries. See *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Our review of the record reveals that the photographs were explained in a clinical manner, without undue sensationalism. Moreover, defendant was charged with first-degree premeditated murder and, therefore, his intent was directly at issue in the case. Evidence of injury is admissible to show intent to kill. *Mills, supra* at 71. The autopsy photographs were directly probative of defendant's intent because they illustrated the nature and extent of the victim's injuries. *Id*. The photographs were also probative of whether the victim was struck repeatedly and strangled and, therefore, relevant to show that the killing was premeditated, and whether defendant had time to take a "second look" at his actions. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). We presume that "today's jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing . . . the body of a victim in the condition . . . in which found." *Mills, supra* at 77 n 11, quoting *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969). For these reasons, the trial court did not abuse its discretion in admitting the photographs at trial.

IX

Also, in his Standard 4 brief on appeal, defendant argues that the trial court erred when it did not grant an adjournment to accommodate an out of state witness. We review a trial court's denial of a defendant's request for an adjournment for an abuse of discretion. *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987).

In order to invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and due diligence. *Taylor, supra*. Even with good cause

[6] See Administrative Order No 2004-6 (permitting a defendant to file a brief in propria persona).

and due diligence, however, a trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). A trial court may grant an adjournment "on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2).

Here, defendant sought an adjournment in order to produce a witness named Rodney Cobb a/k/a Rodney Stork, whom defendant states had agreed to come to Michigan for the trial, but who was not present in court when trial commenced. It is unclear exactly what efforts were made to confirm the witness's attendance at trial. But even if we were to give defendant the benefit of the doubt on the diligent efforts prong, defendant cannot satisfy the first prong of the court rule. In order to receive an adjournment, a defendant must show that the evidence he will present through the missing witnesses is material. MCR 2.503(C)(2). Although defendant argues that this witness's testimony may have shown that Kyle Chapman was either lying or "gravely mistaken," he also states in his Standard 4 brief that "it was just unknown what he would say." And as such, defendant has failed to meet his burden. Therefore, the trial court did not abuse its discretion when it denied defendant an adjournment.

X

In his Standard 4 brief on appeal, defendant claims that the prosecutor engaged in misconduct, thus denying him his right to a fair trial. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich.App 572, 586; 629 NW2d 411 (2001). This Court reviews defendant's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Carines, supra* at 763. Even where such error is shown, reversal of a conviction is warranted only when the established plain error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), rev'd in part on other grounds *Crawford, supra*.

Defendant specifically asserts that the prosecutor improperly injected sympathy into the case when he stated that this murder had left three people without their mother and that the victim's son would have the memory of finding his dead mother in his memory forever. Further, defendant assigns error to the prosecution mentioning Dyer's involvement in church services on the night in question because it implied her "goodness." Defendant does not support his

argument other than to state that these comments were unnecessary and unduly prejudicial. After reviewing the record as a whole, including the prosecutor's remarks, we conclude that the remarks had their basis in the evidence on record and rational inferences thereof, and were permissible commentary on the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (prosecutors are accorded great latitude regarding their arguments and conduct and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case). Accordingly, the prosecutor did not improperly elicit sympathy for the victim.

Defendant also argues that the prosecutor impermissibly argued facts not in evidence. A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor is free to argue all reasonable inferences that flow from the evidence as they relate to the prosecution's theory of the case. *Bahoda*, *supra*. Defendant assigns error to a long list of facts that the prosecutor argues but that he believes were not in evidence. To the contrary, our review of the record reveals that the prosecutor was properly arguing facts that actually were in evidence through witness testimony and/or reasonable inferences flowing from the evidence as it related to the prosecutor's theory of the case. *Id*. As such, defendant has shown no error.

Because we have not found any plain errors with respect to the prosecutor's conduct, there is no merit to defendant's argument that the cumulative effect of the prosecutor's conduct denied him a fair trial. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). We further find no merit to defendant's argument that the trial court should have taken independent action regarding the prosecutor's assigned errors.

XI

Finally, defendant contends in his Standard 4 brief that the trial court should not have instructed the jury regarding the charges of second-degree home invasion, MCL 750.110(a)(3), larceny in a building, MCL 750.360, and unlawfully driving away an automobile (UDAA), MCL 750.413. Defendant also asserts that after the jury convicted defendant of these charges, the trial court erred when it allowed the convictions to stand. Defendant bases these arguments on the assertion that he had not received notice of these charges and thus his due process rights were violated and the convictions cannot stand. Because defendant did not raise this issue in the trial court, it is not preserved for appellate review. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). As such, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra*. Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Id*. at 763.

MCL 767.45 provides in relevant part:

> (1) The indictment or information shall contain all of the following:
>
> (a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.

> (b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.
>
> (c) That the offense was committed in the county or within the jurisdiction of the court. No verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.

Here, the felony information alleged that defendant committed first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b) premised on second-degree home invasion, MCL 750.110(a)(3) and/or larceny in a building, MCL 750.360 arising from the death of Dyer. Thus, there is no doubt that defendant's argument regarding second-degree home invasion and larceny in a building fail because he was fairly apprised of these charges in accordance with MCL 767.45.

Defendant also claims in his in pro per brief that he did not have notice of the charge of UDAA, MCL 750.413, before the trial court instructed the jury of that charge during his trial. Defendant's original felony information listed only the first four charges: first-degree murder, first-degree felony murder, second-degree home invasion, and larceny in a building—but no UDAA charge. The transcripts of the one man grand jury display that the UDAA charge was not read to defendant. Later at the defendant's arraignment, defendant stood mute and waived the reading of the information. There was no mention of the UDAA charge at the arraignment. At the beginning of the jury trial, when the trial court informed the potential jurors about the case, the trial court stated that defendant was only charged with four counts, and did not list the UDAA charge. Ultimately though, after the presentation of the proofs, the trial court instructed the jury on UDAA and the jury found defendant guilty of that charge along with the others.

The lower court record also contains an amended felony information that does include the charge of UDAA. But the date on the amended felony information is *after* the jury convicted defendant of the charge. The trial court register of actions confirms that an amended felony information was filed after defendant's conviction and not before. Further, the record contains no mention of an order signed by the trial court associated with the amended felony information, and we have not located an order allowing for the amendment of the felony information in the record.

The due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. US Const, Am XIV; *Koontz v Glossa*, 731 F 2d 365, 369 (CA 6, 1984). This requires that the offense be described with some precision and certainty. *Id*. However, MCL 767.76 provides that a trial court may amend the information at any time before, during, or after trial in order to cure a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). Although a defendant has a due process right to fair notice of the charges, prejudice is an essential prerequisite of a claim of inadequate notice. *People v Darden*, 230 Mich App 597, 600-602; 585 NW2d 27 (1998).

Our review of the record reveals that defendant was never apprised of the charge of UDAA before he was convicted of that charge in violation of his due process rights. Further, the amendment of defendant's felony information after his conviction added a completely new charge in violation of MCL 767.76. *Stricklin*, *supra*. As a result, the state did not adequately notify defendant of all of the charges against him. The inadequate notice prejudiced him because he suffered unfair surprise and was not allowed a sufficient opportunity to defend against the charge of UDAA. Because defendant has demonstrated prejudice and shown a structural error affecting the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence, defendant has established plain due process error arising from his right to fair notice. *Carines*, *supra*. As such, we vacate defendant's UDAA conviction and sentence, and remand to the trial court for correction of the judgment of sentence.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio