

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WAYNE HUBBARD,

Defendant-Appellant.

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UNPUBLISHED  
December 6, 2005

No. 256831  
Jackson Circuit Court  
LC No. 03-004124-FC

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), for which he was sentenced to serve a mandatory term of life imprisonment. Defendant appeals from his conviction as of right. We affirm.

In late August 2003, the badly decomposed body of a young female was found in an unoccupied house on East Biddle Street in the city of Jackson. Although initially not identifiable, the body was eventually determined to be that of defendant's girlfriend, seventeen-year-old Yatasha Bush. Further investigation into the matter led to defendant's arrest and the instant conviction. On appeal, defendant raises numerous allegations of error. None of these, however, warrant reversal of his conviction.

I. Evidentiary Claims

A. Hearsay Statements of the Victim

Defendant first argues that the trial court abused its discretion in allowing the prosecution to present testimony concerning statements made by Yatasha to others, wherein Yatasha indicated that she was fearful of and had been impregnated by defendant, that she had a new boyfriend and sought to end her relationship with defendant, and that during their relationship defendant had controlled and abused her while providing her with illegal drugs. Specifically, defendant argues that these statements were not admissible under MRE 803(3) and that, even if admissible under that rule, they were not relevant to any issue at trial.<sup>1</sup>

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<sup>1</sup> Defendant also argues that because the trial court addressed only the relevancy of such  
(continued...)

To properly preserve an evidentiary issue for review, “a party opposing the admission of evidence must object at trial and specify the same ground for objection that [he] asserts on appeal.” *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1). Here, although counsel for defendant arguably challenged the admissibility of the subject statements on the grounds of relevancy, MRE 401, and unfair prejudice, MRE 403, he at no time asserted a failure of those statements to meet the requirements for admissibility under MRE 803(3). Thus, although defendant has preserved the issue whether the subject statements were relevant to the issues to be decided at trial, the issue whether those statements meet the requirements for admissibility under MRE 803(3) has not been preserved for this Court’s review. *Aldrich, supra*. Where a defendant has preserved his challenge to the admissibility of evidence by appropriate objection at trial, this Court will review the trial court’s decision whether to admit that evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, in the absence of a proper objection preserving the issue at trial, this Court’s review of an evidentiary issue is limited to plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

### 1. Relevancy

We first address defendant’s challenge of the relevancy of the subject statements. The trial court found that Yatasha’s statements concerning her fear of defendant, that she had obtained a new boyfriend, and that she sought to end her relationship with defendant were relevant to the issue of motive for the killing. As explained below, the trial court’s ruling in this regard was not an abuse of discretion. *Katt, supra*.

Although not an essential element of a crime, proof of motive in a prosecution for murder is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Moreover, a homicide victim’s state of mind evincing discord in a relationship with the defendant can be relevant to issues such as the defendant’s motive. *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995). Here, Yatasha’s statements regarding her fear of and desire to leave defendant evinced discord in their relationship and were, therefore, relevant to a possible motive and explanation for why defendant would kill Yatasha, i.e., the deterioration and possible end to a domestic relationship already filled with discord. That Yatasha had begun

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(...continued)

evidence and not the specific requirements for admission of testimony under MRE 803(3), the court failed to properly recognize and exercise its discretion when ruling on the admissibility of Yatasha’s extra-judicial statements. However, there is no legal requirement that a trial court state on the record that it is exercising its discretion. See *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). Moreover, absent clear evidence that a trial court incorrectly believed that it lacked discretion, the presumption that the trial court knows the law must prevail. See, e.g., *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). Here, admission of the subject statements was expressly sought by the prosecution under MRE 803(3), the substance and requirements of which were detailed by the prosecution in its written motion. Furthermore, and perhaps more importantly, although defendant challenged the admissibility of the subject statements on the grounds of relevancy, MRE 401, and unfair prejudice, MRE 403, he at no time asserted a failure of those statements to meet the requirements for admissibility under MRE 803(3). Under such circumstances, there is no basis for this Court to conclude that the trial court failed to recognize or properly exercise its discretion. *Knapp, supra*.

seeing someone else was similarly relevant to demonstrate the deteriorating state of her relationship with defendant and was thus also relevant to show motive for her killing. *Fisher, supra; Rice, supra*. Similarly, although not addressed by the trial court, defendant's abuse and control over the mother of his unborn child were also relevant to motive. Indeed, this Court has stated that a prior assault of a homicide victim is "highly probative" of a defendant's motive and intent to kill, and is properly admissible in a prosecution for murder. See *People v Hill*, 167 Mich App 756, 762-763; 423 NW2d 346 (1988). Moreover, when viewed in connection with Yatasha's miscarriage and purported desire to end the relationship, the fact of her pregnancy and the extreme control exhibited over her by defendant during the course of their relationship becomes highly relevant to the issue of motive for the killing, i.e., the loss of both that control and his unborn child. Similarly, although arguably less so, that defendant was at times the source from which Yatasha obtained the illegal drugs abused by both of them throughout the course of their relationship becomes relevant when viewed in connection with testimony that defendant would often receive the proceeds of Yatasha's prostitution activities, which he would then use to acquire drugs. Because the loss of this pecuniary benefit attendant his relationship with Yatasha holds the tendency to make the existence of a "fact of consequence" at trial, i.e., motive for the killing, more or less probable, such evidence was relevant. MRE 401.

## 2. Victim's State of Mind

However, that the substance of the extra-judicial statements at issue was relevant to an issue at trial does not alone warrant their admission into evidence. It is well settled that the statements of a person, other than those made while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted are not admissible unless they fall into one of the exceptions outlined in the Michigan Rules of Evidence. See MRE 801(c); see also MRE 802. MRE 803(3) provides one such exception to the general bar against hearsay for statements made regarding a declarant's then existing mental, emotional, or physical condition. Specifically, this rule states that the following are not excluded by the hearsay rule:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. [MRE 803(3).]

Relying on MRE 803(3), our Supreme Court has made clear that evidence that "demonstrates an individual's state of mind will not be precluded by the hearsay rule," and that statements of murder victims as to plans or feelings are admissible where relevant to material issues, including motive. *Fisher, supra* at 449-450. As explained above, much of the challenged testimony served and was offered to show the victim's state of mind with regard to discord between defendant and herself shortly before she was killed, which in turn relevantly demonstrates motive for the killing. As such, the victim's statements that she feared and desired to end her relationship with defendant, and had begun seeing someone new, were admissible under MRE 803(3) as circumstantial evidence of motive. As a statement of her then-existing physical condition, the victim's claim of pregnancy was similarly both relevant to the issue of motive and admissible under MRE 803(3). See, e.g., *Robinson v State*, 11 P3d 361, 371-372 (Wy, 2000) (statement of victim indicating fact of pregnancy by defendant was admissible as

statement of “then-existing physical condition”). Accordingly, defendant has failed to show plain error in the admission of those statements into evidence.<sup>2</sup>

### 3. Abuse and Prostitution of Victim

The same cannot be said, however, for Yatasha’s statements regarding her abuse and prostitution, and the provision to her of drugs by defendant. In *People v Moorer*, 262 Mich App 64, 69; 683 NW2d 736 (2004), this Court held that the trial court erred in admitting a victim’s statements to others regarding the defendant’s threats and actions because these were statements of memory or belief expressly excluded from those statements excepted from the rule against hearsay under MRE 803(3). Specifically, the panel found that such statements “relate to past events and are specifically excluded under MRE 803(3) as statements of ‘memory or belief to prove the fact remembered or believed . . . .’ They therefore do not fall within the parameters of MRE 803(3).” *Id.* at 73. In reaching this conclusion the panel noted that the exclusion from MRE 803(3) of a declarant’s statements of memory or belief is necessary to preserve the purpose of the rule against hearsay by preventing statements evincing a state of mind from serving as the basis for an inference of the happening of the event that produced the state of mind.<sup>3</sup> *Id.* at 73-74, citing FRE 803(3), Advisory Committee’s Note, 56 FRD 183, 305. As in *Moorer*, Yatasha’s statements regarding her abuse and prostitution, and the provision to her of drugs by defendant, relate to events that she remembered having occurred rather than her state of mind. Consequently, admission of those statements into evidence at trial was error. Such error, however, does not require reversal of defendant’s conviction.

Unpreserved evidentiary error, even if plain, does not warrant reversal unless it is affirmatively shown that the error affected the outcome of the trial. *Carines, supra* at 763. As discussed below, other non-hearsay testimony showing that Yatasha was subjected to abuse and prostitution at the hands of defendant was properly admitted at trial under MRE 404(b), thereby mitigating or otherwise rendering harmless any prejudicial effect of such testimony on the outcome of the trial. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) (“[a]n

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<sup>2</sup> In reaching this conclusion, we reject defendant’s assertion that Yatasha’s statements evincing her state of mind, e.g., her fear of and desire to leave defendant, were nonetheless inadmissible because he did not place Yatasha’s state of mind at issue and there was no evidence at trial to indicate that defendant was aware of her plan to leave him or the fact that she had obtained a new boyfriend. This Court has expressly held that a victim’s state of mind need not be at issue in order for such evidence to be admissible under MRE 803(3). *People v Coy*, 258 Mich App 1, 15-16; 669 NW2d 831 (2003). Moreover, contrary to defendant’s assertion, testimony at trial showed that defendant was aware both that Yatasha had ended the relationship and that she had obtained a new boyfriend. Yatasha’s new boyfriend testified that he informed defendant of his relationship with Yatasha only a short time before the murder. Tammy Hurley also testified that she discussed with defendant the fact that he and Yatasha were no longer together, a fact that defendant indicated to Hurley upset him.

<sup>3</sup> The *Moorer* panel also found the conclusory and “perfunctory analysis” of MRE 803(3) in *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2001), relied on by the prosecution both below and on appeal, to be unhelpful in determining whether similar statements found to be admissible in *Ortiz* were properly admitted. *Id.* at 69.

erroneous admission of hearsay evidence can be rendered harmless where corroborated by other competent testimony”). Moreover, even without these statements, the evidence against defendant was overwhelming.

Shaylene Clark testified that she was with Yatasha on the night she was killed and, in fact, witnessed her murder. According to Clark, after picking up both her and Yatasha from a party at the home of a man named “Timmy,” defendant drove the girls in a green minivan to an unoccupied house where, during an argument regarding Yatasha having lost defendant’s baby “and the things she was doing to get money,” defendant murdered Yatasha by cutting her throat outside a bedroom located on the first floor of the home. Although defendant challenges the credibility of Clark’s testimony on the basis of her admitted inability to vividly and consistently recall the events during the weeks following the murder, we note that Clark’s recount of the murder itself was, nonetheless, both detailed and consistent with other evidence admitted at trial.

With respect to the scene of the crime, although indicating that she had never before or since the murder visited the house in which Yatasha killed, Clark’s testimony regarding the floor plan of the home and the location of the murder therein were consistent with the testimony and photographic evidence provided by the investigating officers who discovered Yatasha’s body just inside the doorway of a first floor bedroom approximately two weeks after the killing. Clark’s testimony that the three entered the unoccupied home through a rear entrance that had been boarded shut was also consistent with the condition of the home as testified to by the investigating officers, who recalled at trial that, with the exception of a rear door that had been boarded shut but appeared to at sometime have been pried open, the home was secure.

Clark’s testimony concerning the manner in which Yatasha was killed was also strikingly consistent with that of the medical examiner who performed the autopsy on Yatasha’s body. The medical examiner testified that a reddish-brown stain found on the carpeting inside the home near the neck of the body was shown through testing to be human blood that had soaked the carpeting near the area of the neck. The medical examiner further testified that this evidence, when viewed in combination with the excessive decomposition of the throat area, indicated “trauma” to the neck consistent with Yatasha’s throat having been “cut [or] slashed so that a large amount of blood was lost from there,” causing her death.

The condition of the scene and the evidence derived from the body were not, however, the only evidence to lend credence to Clark’s testimony and support defendant’s guilt independent of the erroneously admitted hearsay testimony. Indeed, Detective Gary Schuette of the Jackson Police Department testified that at the time Clark first relayed to him her account of the murder he had yet to positively identify either the body or a cause of death. Schuette further testified that before either of these facts were known to the public, defendant arrived at the police station requesting to speak with someone about a body recently found by the police in a house. Schuette testified that defendant thereafter indicated with extreme certainty that the body found by the police was that of his girlfriend, Yatasha Bush, who had been raped and then murdered by having her throat slashed. Although initially hypothesizing that Yatasha had been killed by her new boyfriend at the behest of her father, when presented with both a photograph of Yatasha and Schuette’s theory of defendant’s involvement in her death, defendant began to cry uncontrollably before stating, “Fuck it. I’m just going to tell you what happened.” After then describing having picked up both Clark and Yatasha from the home of a man named “Timmy” using a van

borrowed from a friend, defendant paused momentarily before stating, “I ain’t confessing. You gotta prove it. You can’t place me in that house.”

These inculpatory statements corroborating at least a portion of Clark’s testimony and evincing knowledge of the identity of the victim prior in time to any public release of that information were not the only such statements made by defendant. Tammy Hurley testified that sometime in early August 2003 she observed defendant enter a green minivan being driven by a woman and that, as he entered the van, defendant stated that he was going to get Yatasha. Hurley also testified that on the day Yatasha’s body was found she was approached by defendant while at a party store on Biddle Street. Hurley testified that as defendant approached her, he began to cry while telling her that Yatasha was dead and that it was her body that had been found in the house on Biddle Street. Hurley noted, however, that at the time defendant made this statement to her the police had not yet even brought the body out from the house.

In light of the foregoing evidence, including defendant’s own statements evincing knowledge of the identity of the victim and the manner in which she was killed prior in time to any public release of that information, defendant cannot show that any error in the admission of Yatasha’s extra-judicial statements was outcome determinative. *Carines, supra*.

#### B. Other Acts Evidence

Defendant also argues that the trial court erred in admitting, for the purpose of establishing motive, other, non-hearsay evidence indicating that defendant had abused, prostituted, and provided Yatasha with illegal drugs. We do not agree.

MRE 404(b) prohibits evidence of prior bad acts to prove a person’s character, but permits the admission of such evidence for other purposes, such as proof of motive. Thus, to be admissible, evidence of other bad acts must be offered to prove something other than a character or propensity theory, must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

On appeal, defendant asserts only that the challenged evidence was not relevant to the issue of motive and that the trial court, therefore, erred in so finding. However, in challenging the admission of the subject evidence below, counsel for defendant conceded the relevance of defendant’s prostitution and abuse of Yatasha to the issue of motive for the killing. As such, the question whether the challenged evidence was relevant to the issue of motive for the killing has been waived for purposes of appellate review. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nonetheless, as noted above, this Court has previously held that evidence of a prior assault of a homicide victim is “highly probative” of a defendant’s motive and is, therefore, properly admissible in a prosecution for murder under MRE 404(b). See *Hill, supra*; see also *Rice, supra*. Moreover, as also already discussed, to the extent that defendant’s prior abuse of Yatasha evinces discord in their relationship, evidence of such abuse was highly relevant to the issue of motive and was, therefore, admissible under MRE 404(b).

Evidence that defendant prostituted and at times provided Yatasha with illegal drugs habitually abused by them both throughout their relationship becomes similarly relevant when viewed in connection with testimony that defendant would often use the proceeds of Yatasha’s

prostitution activities to acquire the drugs. Indeed, as noted above, the loss of this pecuniary benefit upon Yatasha's leaving defendant was relevant to explain a motive for the killing. MRE 401.

Defendant also challenges the relevancy of evidence that defendant engaged Clark in nonconsensual sexual intercourse and had similarly abused other young women. However, this Court has held that evidence of a defendant's prior bad acts is relevant to explain a victim's delay in reporting alleged abuse. See, e.g., *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996); see also, e.g., *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995). In the instant case, defendant's prior conduct toward Clark and other similarly situated women was relevant to explain why Clark did not report the killing immediately after it occurred, but instead stayed with defendant at least for a period of time. Moreover, because such evidence was relevant and admissible, the prosecutor's failure to raise the fact of nonconsensual intercourse at the evidentiary hearing does not constitute plain error for lack of notice of the prosecutor's intent to admit that evidence at trial. See *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001); see also MRE 404(b)(2) (requiring "reasonable notice in advance of trial" of the intent to introduce evidence under MRE 404(b)). In any event, as with the admission of Yatasha's extra-judicial statements concerning her abuse and prostitution by defendant, any error in the admission defendant's prior bad acts was harmless in light of the weight and strength of the untainted evidence showing defendant's guilt.

### C. Limiting Instruction

Defendant also argues that he was denied a fair trial as the result of the trial court's erroneous instruction regarding the permissible use of the other acts evidence by the jury. Specifically, defendant argues that despite having found such evidence relevant only to establish motive, the court instructed the jurors that the evidence of defendant's prior bad acts could also be used to determine the identity of Yatasha's killer. However, because counsel for defendant acquiesced in the instructions as given, defendant is entitled to no relief on this unpreserved claim of error.<sup>4</sup> *Carter, supra*. Indeed, this acquiescence by defense counsel served to extinguish any error with regard to the challenged instruction. *Id.*

In any event, even assuming that there had been no extinguishment of the alleged error, there is no basis for reversal under the plain error analysis applicable to unpreserved allegations of error. *Carines, supra*. As indicated above, to obtain relief under the plain error doctrine a defendant must demonstrate the existence of a clear or obvious error that affected the outcome of the case. *Id.* Here, regardless of the trial court's previous ruling, the identity of Yatasha's killer was placed into issue by defendant's general denial of the charge, and proof of identity is expressly provided for as proper purpose for the admission of other acts evidence. See MRE 404(b).

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<sup>4</sup> Further, this issue is not properly before this Court because it was not raised in the statement of questions presented. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

#### D. Cumulative Effect of Evidentiary Error

Defendant also argues that the cumulative effect of the evidentiary and accompanying instructional errors alleged on appeal denied him a fair trial. However, although the cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not, see *Hill, supra* at 152, only actual errors are aggregated to evaluate their cumulative effect, *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Here, only the admission of Yatasha's extra-judicial statements concerning defendant's abuse, prostitution, and provision to her of illegal drugs has been determined to be error. As noted above, however, the substance of that testimony was cumulative to evidence properly admitted at trial under MRE 404(b). Consequently, given the cumulative nature of the erroneously admitted testimony and the overwhelming evidence of defendant's guilt, as derived from the untainted evidence, these evidentiary errors were not outcome determinative and therefore do not require reversal of defendant's conviction. See *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

#### II. Prosecutorial Misconduct

Defendant next argues that he was denied a fair trial by several instances of prosecutorial misconduct at trial. Again, we disagree.

Generally, this Court reviews de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because defendant failed to object to the alleged instances of prosecutorial misconduct, this Court's review is again limited to plain error affecting defendant's substantial rights. *Id.*

Defendant first asserts that the prosecutor improperly elicited testimony at trial concerning defendant's sexual assault of Shaylene Clark following the murder. Specifically, defendant asserts that because the fact of that assault was not raised at the pretrial evidentiary hearing on the prosecution's motion to admit other acts evidence, he was deprived of the opportunity to challenge or otherwise develop the foundation for such testimony. However, as previously discussed, evidence of defendant's sexual assault of Clark was both relevant and admissible under MRE 404(b) to explain Clark's delay in reporting the murder. As such, any challenge to its admission at trial would have been futile. Moreover, Clark's testimony concerning the assault was brief and was not mentioned by the prosecutor when arguing defendant's guilt at the close of trial. Consequently, defendant cannot demonstrate that the prosecutor's failure to earlier present this testimony affected the outcome of the trial. *Id.*

For this same reason, we reject defendant's claim that he is entitled to a new trial on the ground that, by introducing evidence that defendant provided Yatasha with illegal drugs, the prosecutor exceeded the scope of the trial court's pretrial ruling regarding admission of other act and hearsay testimony. As previously discussed, such testimony by those witnesses who actually observed defendant provide Yatasha with illegal drugs was both relevant under MRE 401, and admissible to show motive under MRE 404(b). Moreover, although testimony concerning Yatasha's statements to that effect to others was improper, the prejudicial effect of that error was negated by the cumulative nature of such testimony and the weight of the overwhelming evidence of defendant's guilt.



Defendant also asserts that the prosecutor improperly argued during her opening statement that it was through defendant that Yatasha “found” both drugs and prostitution. In so arguing, defendant relies on the failure of the prosecutor to subsequently elicit testimony to support her statement in this regard at trial. However, contrary to defendant’s assertion, Karla Wing and Angela Haynes both testified regarding the dramatic change in Yatasha’s appearance, hygiene, and behavior after beginning her relationship with defendant. Haynes additionally testified that upon being confronted with these changes, Yatasha acknowledged the use of drugs provided to her by defendant and having prostituted herself “to survive.” Although such evidence did not directly support the prosecutor’s comment during her opening argument, it is well settled that a prosecutor’s reference during opening statements to evidence that is not subsequently admitted at trial does not warrant reversal if the reference was made in good faith, and no prejudice resulted. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). Here, given the testimony of both Wing and Haynes, and considering the trial court’s instructions limiting the use of such other acts evidence, and admonishing the jury that the statements of the attorneys trying the case do not constitute evidence, we conclude that the challenged comment was made by the prosecutor in good faith and did not result in prejudice to defendant. Consequently, defendant has failed to demonstrate the plain error required for relief. *Ackerman, supra*.

Defendant has similarly failed to demonstrate that he is entitled to relief as a result of the prosecutor’s argument during her closing statement that defendant sought to use their unborn child as a “hold” over Yatasha, and that he “hunted” her down and killed her in order to teach both she and Shaylene Clark “a lesson.” Our Supreme Court has held that prosecutors are free to argue the evidence and all reasonable inferences arising therefrom as it relates to their theory of the case. See *Bahoda, supra* at 282. Contrary to defendant’s assertion, the inferences drawn by the prosecutor in making these arguments were supported by the testimony of Angela Haynes and Albert Bush, both of whom indicated at trial that defendant seemingly could not accept that Yatasha wished to end her relationship with him and would continuously reappear at their homes each time Yatasha would separate herself from him for any period of time. Tammy Hurley also testified that shortly before Yatasha was found murdered, defendant indicated to her that he was upset that Yatasha had left him, that he was going to find her, and that he wished to take their unborn child from her. Several witnesses, including Angela Haynes and Jessica Turk, also testified regarding the control exhibited by defendant over Yatasha and the consequences suffered by her when she would defy that control. Given this evidence, we do not conclude that the prosecutor exceeded the bounds of appropriate inference by asserting that defendant pursued and killed Yatasha, at least in part, for having challenged that control.

It was similarly within the bounds of appropriate argument for the prosecutor to assert during her opening statement that after having killed Yatasha, defendant left her “to rot, just like so much garbage.” Prosecutors are not required to use the blandest of all possible terms, and may use “hard language” when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Contrary to defendant’s assertion, this characterization of the circumstances in which Yatasha was left by defendant was more than a mere appeal to the sympathies of the jury. Indeed, the prosecutor’s statement in this regard was supported by the evidence at trial, which included several photographs depicting the advanced state of decomposition at the time Yatasha’s body was found. Consequently, the prosecutor’s argument did not constitute misconduct.

That the prosecutor sought before trial to introduce evidence that defendant habitually carried a knife, but then argued during her closing statement that defendant's possession of a knife on the night of the murder evinced premeditation was similarly not misconduct. In challenging the prosecutor's conduct in this regard, defendant relies solely on *Stumpf v Mitchell*, 367 F3d 594, 611 (CA 6, 2004), wherein the prosecution's "use of inconsistent, irreconcilable theories to convict two defendants" for the same murder was found to violate due process. However, unlike *Stumpf*, the theories advanced by the prosecutor in the instant case, although arguably inconsistent, were not also "irreconcilable." In other words, a finding that defendant habitually carried a knife does not necessarily foreclose the possibility that his possession of a knife on the night of the murder was the product of a premeditated intent to kill. *Stumpf* therefore does not provide a basis from which to conclude that the prosecutor's varying theories at the differing stages of the prosecution was misconduct. Consequently, defendant has failed to show plain error affecting his substantial rights. *Ackerman, supra*. Moreover, because he has failed to demonstrate any misconduct by the prosecutor, defendant's claim of cumulative error stemming from such conduct must similarly fail. See *People v LeBlanc*, 465 Mich 475, 491-492 n 12; 640 NW2d 246 (2002).

### III. Effective Assistance of Counsel

Defendant next argues that he was denied his right to the effective assistance of counsel as a result of his trial counsel's failure to adequately challenge or otherwise object to the admission of the hearsay and other acts testimony proffered by the prosecution at trial. Defendant also argues that counsel was similarly ineffective for failing to object to the several instances of prosecutorial misconduct discussed above. However, because defendant has failed to establish any prejudicial error stemming from either of these alleged deficiencies of counsel, his challenge of the effectiveness of his trial counsel is, ultimately, without merit.

To establish a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that this deficient performance prejudiced his defense, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). However, because "the object of an ineffectiveness claim is not to grade counsel's performance," when evaluating a defendant's claim of ineffective assistance of counsel "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995). Thus, with respect to the alleged failure of his counsel to adequately challenge the admission of the hearsay and other acts testimony proffered by the prosecution at trial, this Court need not determine whether counsel's response to the admissibility or ultimate admission of such evidence fell within the realm of prevailing professional norms. *Rodgers, supra*. As previously discussed, regardless whether such evidence was properly admitted, the strength and weight of the remainder of the evidence against defendant was overwhelming. Consequently, defendant cannot establish that his counsel's deficiencies in challenging the subject evidence, if any exist, prejudiced his defense. *Strickland, supra*. Moreover, as also previously discussed, defendant

has failed to show any misconduct on the part of the prosecutor. Therefore, because counsel is not required to advocate a meritless position, see *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), his counsel was similarly not ineffective for failing to object to conduct of the prosecutor cited on appeal.

#### IV. Premeditation and Deliberation

Defendant next asserts that the prosecution presented insufficient evidence of premeditation and deliberation to support his conviction of first-degree premeditated murder. We disagree.

In reviewing the sufficiency of the evidence to support a conviction, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). The elements of first-degree murder are that the defendant killed the victim and that the killing was “willful, deliberate, and premeditated.” *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), citing MCL 750.316(1)(a). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Thus, to establish premeditation and deliberation, the prosecution must show the existence of time between the initial homicidal intent and the ultimate action sufficient to afford a reasonable person time to take a second look. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Moreover, where, as here, the evidence establishes a fight and then a killing, there must also be a showing of a thought process which is not disturbed by hot blood. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998).

Here, when viewed in the light most favorable to the prosecution, the evidence at trial was sufficient to establish such process of thought despite the argument that precipitated the killing. In recounting the murder at trial, Shaylene Clark testified that during the minute or so between the time that defendant first produced the knife and actually cut Yatasha’s throat, defendant slid the blade lightly across Yatasha’s neck while stating that he was going to kill her. Defendant’s stated intention, when combined with the time period between his indication of that homicidal intent and the ultimate act of cutting his victim’s throat, provided an opportunity for a second look sufficient to support a rational trier of fact in concluding that the killing was both premeditated and deliberate.

#### V. Voluntary Manslaughter

Finally, defendant argues that the trial court erred in denying his request that the jury be instructed on the lesser offense of voluntary manslaughter. Again, we disagree.

This Court reviews claims of instructional error de novo. See *People v Walls*, 265 Mich App 642, 644, 697 NW2d 535 (2005). Because voluntary manslaughter is a necessarily included lesser offense of murder, defendant was entitled to such instruction only if supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 542; 664 NW2d 685 (2003). “[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Id.* at 535-536. Here, as

previously discussed, despite evidence of a heated dispute between Yatasha and defendant, the interval of time between defendant's statement of his intention to kill Yatasha and the ultimate act of cutting her throat was sufficient for a reasonable person to regain control of his passions. Consequently, instruction on the lesser included offense of voluntary manslaughter was not supported by a rational view of the evidence and the trial court, therefore, did not err by refusing to instruct the jury on that offense.

In any event, even were such instruction supported by the facts, "where a defendant is convicted of first-degree murder, and the jury rejects other lesser-included offenses, the failure to instruct on voluntary manslaughter is harmless." *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998). Here, the trial court instructed the jury on the law concerning both first- and second-degree murder. Because the jury rejected the lesser included offense of second-degree murder, any error arising from the trial court's refusal to also instruct on voluntary manslaughter was harmless. *Id.*

Affirmed.

/s/ Hilda R. Gage  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray