STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2013
v	No. 301622 Wayne Circuit Court
PETER NORMAN DABISH, Defendant-Appellant.	LC No. 10-004848-FC

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317,[1] and torture, MCL 750.85. The trial court later vacated the second-degree murder conviction and sentenced defendant to life imprisonment for the felony-murder conviction and a concurrent term of 23 to 80 years' imprisonment for the torture conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURE

Defendant was convicted of torturing and killing 23-year-old Diana DeMayo ("Diana"), who died from multiple blunt force injuries on the morning of March 11, 2010. Defendant and Diana had been involved in a relationship, but the nature of that relationship was disputed. Defendant denied that he was romantically involved with Diana at the time of her death.

On March 7, 2010, Diana and defendant went to Diana's father, Edward DeMayo's ("DeMayo"), home for dinner, but the event did not go well because Diana and defendant apparently were both were under the influence of drugs. DeMayo confronted defendant about his behavior at dinner and expressed his displeasure with both defendant's and Diana's conduct. The next day, Diana called her father and told him that defendant was angry with her, and asked DeMayo to apologize to defendant. A short time later, defendant called DeMayo, and accused

[1] Defendant was charged with alternative counts of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony-murder. The jury found defendant guilty of second-degree murder as a lesser offense to the premeditated murder charge.

him of having "a lot of nerve" and treating defendant "like [expletive]" the night before; he also accused DeMayo of stalking Diana. Defendant was very loud and enraged during this call, and ended it by saying "[Expletive] you" and hanging up the telephone.

Defendant formerly lived in Waterford Township, but leased an apartment at a Detroit residence hotel on March 9, 2010. By the evening of March 10, 2010, defendant had moved into the apartment. That evening, defendant complained to the building's staff because they had allowed Diana to move some of her belongings into his apartment without his consent. He was also upset because Diana had given her telephone number to some hotel employees. In his conversations with a hotel supervisor that evening, he referred to Diana as a "whore" and threatened to "kick somebody's ass." Later that night, defendant and Diana both appeared intoxicated and possibly "high."

DeMayo spoke to Diana at 9:00 p.m. that night. At that time, Diana sounded happy and they had a great conversation.

At about 10:30 p.m. on March 10, DeMayo received a call from defendant on Diana's phone. Defendant identified himself and said that he had Diana's phone; he was loud and sounded angry. Defendant made reference to the March 7 dinner. Defendant then twice yelled that he was "going to lay her [Diana] down and I'm going to [expletive] her up the ass cause I'm pissed at you." DeMayo was shocked and hung up the telephone. Defendant called DeMayo back multiple times that night. During one of the calls, DeMayo asked to speak to Diana, and defendant initially appeared responsive to that request, but defendant then told DeMayo, "Sorry, she's too busy crying."

DeMayo spoke to Diana and defendant by phone at 11:30 p.m. that night. At that time, Diana did not sound the same as she had at 9:00 p.m.; she was very guarded, as if someone were watching her. However, defendant apologized for his earlier behavior and stated that he had had a few drinks. Diana spoke to DeMayo one last time at approximately midnight. She told him that she was tired, and they discussed when DeMayo would get into town the next day.

At 6:19 a.m. on March 11, 2010, defendant called 911 and reported that Diana had overdosed on drugs. Defendant reported to emergency responders that Diana had tried to kill herself by taking his Klonopin medication, and that he had tried to revive her by placing her in the shower, hitting her, and giving her cardiopulmonary resuscitation. When the emergency personnel arrived, Diana was unconscious, but breathing. Defendant had blood on his clothing, and blood was observed on a kitchen counter, a kitchen island and the ceiling above it, a living room wall and carpet, and at the foot of the bathtub. Before calling 911, defendant made two other calls, one to an employee at a gym owned by his family, and the other to his mother. Defendant also placed a call to the apartment building's front desk at approximately 5:30 a.m. and asked that his car be brought out. An aborted 911 call from the same number was previously made at 3:19 a.m. That call was disregarded as a prank.

Diana was transported to the hospital, where she died later that day. The cause of death was determined to be multiple blunt force trauma to the head, and not a drug overdose. According to the medical examiner, Diana received at least eight blows or impacts to her head, and multiple other blows to her body. A toxicology analysis revealed that Diana did not have

benzodiazepine[2] in her blood at the time of her death, but that drug was detected in her urine, meaning that it was in the process of being excreted from her system. Testimony established that death from Klonopin is very rare, and that the drug would have been expected to have been found in Diana's blood if she had died from an overdose.

The defense theory was that Diana accidentally fell, due to her use of drugs and alcohol, and that her injuries may have been compounded by a prior head injury she had received in a car accident two days earlier. The defense also contended that Diana was depressed and suicidal. Defendant denied intentionally hurting Diana and claimed that he only struck her in the face and performed CPR in an attempt to revive her. The defense offered expert testimony that Diana's injuries were not necessarily caused by blows to the head, and that some of the injuries could have been 24 to 48 hours old.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to prove the statutory crime of torture, MCL 750.85, which served as the underlying felony for the felony-murder conviction. When evaluating whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Torture is proscribed by MCL 750.85, which provides:

> (1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.
>
> (2) As used in this section:
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> (a) "Cruel" means brutal, inhuman, sadistic, or that which torments.
>
> (b) "Custody or physical control" means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority.
>
> (c) "Great bodily injury" means either of the following:

[2] Klonopin is part of the class of medications known as benzodiazepines.

(*i*) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(*ii*) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds.

(d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following:

(*i*) The intentional infliction or threatened infliction of great bodily injury.

(*ii*) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality.

(*iii*) The threat of imminent death.

(*iv*) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality.

(3) Proof that a victim suffered pain is not an element of the crime under this section.

(4) A conviction or sentence under this section does not preclude a conviction or sentence for a violation of any other law of this state arising from the same transaction.

Thus, to prove torture, the prosecutor was required to prove beyond a reasonable doubt that (1) defendant intended to cause cruel or extreme physical or mental pain and suffering, (2) defendant inflicted great bodily injury or severe mental pain or suffering, and (3) the victim was within the defendant's custody or physical control.[3] *Id*., see also *People v Schaw*, 288 Mich App 231, 233-234; 791 NW2d 743 (2010).

The medical evidence was sufficient to establish that Diana suffered great bodily injury caused by blunt force trauma to her head and body, which in turn caused internal injuries and seriously impaired her brain functioning, and eventually led to her death. The evidence showed that Diana received at least eight blows to her head and another ten blows to her body. Some of her injuries were consistent with someone striking her or physically slamming her into a hard object. Moreover, the evidence supported an inference that damage to a kitchen cabinet was

[3] Contrary to defendant's invitation, because MCL 750.85 is clear and unambiguous, and contains its own definitions of relevant statutory terms, we find it unnecessary to refer to cases construing California's torture statute for purposes of applying Michigan's torture statute.

caused by Diana being slammed into the cabinet. The evidence was sufficient to enable the jury to find that Diana's injuries qualified as "great bodily injury" within the meaning of MCL 750.85(2)(c)(*i*) and (*ii*).

The evidence was also sufficient to prove that it was defendant who caused the victim's injuries, and that he intended to cause cruel physical pain and suffering. The evidence showed that defendant was upset during the hours preceding Diana's death because she had been allowed access to his apartment without his consent and she had given her telephone number to hotel staff. During this period, defendant repeatedly accused Diana of being a "whore." Defendant also made a telephone call to Diana's father later that night in which he threatened to forcibly sodomize Diana because he was angry with Diana's father. Defendant acknowledged at that time that Diana was crying. When Diana's father spoke to Diana later that night, her voice sounded guarded and she did not seem the same.

Although defendant offered alternative explanations for Diana's injuries, those explanations were not consistent with the medical evidence. Defendant claimed that Diana overdosed from taking defendant's Klonopin medication, but defendant did not provide his medication bottle to emergency personnel when they requested it. Further, medical testimony indicated that an overdose from Klonopin is extremely rare, and a toxicology analysis indicated that Diana did not have that drug in her blood at the time of her death, which would have been expected if she had overdosed from the drug. Defendant also claimed that Diana's injuries were sustained in a fall, possibly due to her intoxication and drug use, or resulted from a car accident two days earlier. However, the prosecution presented medical testimony that Diana's injuries were inconsistent with an accidental fall, and it presented evidence that no injuries were reported after the earlier car accident, which had caused only minor vehicle damage. The number and nature of Diana's injuries also supported a finding that the injuries were intentionally inflicted, and not caused by accidental trauma. As previously indicated, the evidence showed that Diana had received multiple blows to her head and body. In addition, blood evidence was found in different areas of defendant's apartment, and there was evidence of both fresh blood and dried blood in different areas, which supported an inference that Diana sustained multiple injuries at different locations in the apartment, over an extended period of time.

The prosecution also presented other-acts testimony that was probative of defendant's intent to cause physical injury to Diana. According to defendant's former girlfriend, Melissa K, when defendant once became upset with her, he confined her in his house, called her names, spat on her, and shoved her on the bed before she was able to run out. Another witness, AH, testified that when defendant became upset with her for interfering in his relationship with AH's friend, defendant confined her in a car, smacked her hard across her face, threatened her and her family, and then hit her again with his fist.

Viewed in a light most favorable to the prosecution, the evidence supported an inference that defendant caused great bodily injury to Diana with an intent to cause cruel physical pain and suffering.

Finally, the evidence supported an inference that defendant had forcibly restricted or confined Diana within his apartment at the time the injuries were inflicted, and thus that she was within his custody or physical control. The offense took place inside defendant's apartment. A

period of three hours passed between an initial 911 call from defendant's phone that was disregarded as a prank and the time when defendant eventually sought medical assistance for Diana. Evidence indicated that Diana's cell phone was discovered inside the apartment, but it was inoperable because the battery had been removed. The battery had also been removed from another cell phone in the apartment. Although defendant notes that Diana's father testified that he had turned off service to one of the phones on March 10, 2010, there was no evidence that defendant was aware that service to that phone had been stopped. Regardless, the evidence supported an inference that Diana was left without access to a phone to enable her to summon help or seek assistance for her injuries. Viewed in a light most favorable to the prosecution, the evidence was sufficient to allow the jury to infer that Diana was forcibly restricted or confined inside defendant's apartment without her consent, and without liberty to seek outside help. This inference is supported by the other-acts evidence involving Melissa K, see Issue III, *infra*, who claimed that when defendant became upset with her, he locked her in a room and shut the blinds before physically confronting her.

In sum, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant was guilty of torture, and to thereby satisfy the predicate felony element of defendant's felony-murder conviction.

III. OTHER-ACTS EVIDENCE

Next, defendant argues that the trial court abused its discretion when it admitted other-acts testimony from three other women. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Any preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Testimony was taken from several women from defendant's past. Monica K. testified that when she tried to end her relationship with defendant, he appeared at her workplace, took her telephone to see whether she was intentionally ignoring his calls, and threw the telephone down. He also yelled at her, threatened to ruin her reputation and harm her family, and was very intimidating and controlling. AH testified that when defendant was dating AH's friend, defendant was intimidating toward AH, hit her across the face and threatened both her and her family if she continued to have contact with her friend, poured water over her, hit her again with his fist, and spit on her at least five times. Melissa K., defendant's former girlfriend, claimed that defendant once became upset with her while she was at his house, and that defendant then slammed a door, shut the window blinds, locked the doors to prevent her from leaving, called her names, and then grabbed her by her arm and shoved her onto a bed where he poured a can of soda over her head before she was able to escape.

The trial court instructed the jury that the testimony of these other-acts witnesses could only be considered to determine whether defendant "acted purposefully," i.e., whether Diana's injuries "were not the result of an accident or a mistake[,]" or to show defendant's "intent" and "his state of mind." The court advised the jury that it "must not consider this evidence for any other purpose" and that it "must not convict the Defendant here because you think he is guilty of other bad conduct."

The trial court found that the testimony of both Melissa K. and Monica K. was admissible under MCL 768.27b(1), which provides that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant." At trial, defendant conceded that the testimony was admissible under this statute, but argued that it should be excluded under MRE 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Although defendant now challenges the trial court's decision to admit Melissa K's and Monica K's testimony under MCL 768.27b, he is precluded from arguing that point on appeal because he conceded below that their testimony was admissible under the statute. A defendant should not be permitted to claim error on appeal to something his own counsel deemed proper at trial because, to do so, would allow a defendant to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Regardless, defendant has not demonstrated that the evidence involving Melissa K. and Monica K. was inadmissible under MCL 768.27b. Their testimony was relevant to show how defendant treated women with whom he was involved in a relationship when a conflict arose, and the testimony was probative of defendant's state of mind and whether his conduct in this case was purposeful.

Defendant principally argued below, as he does on appeal, that Melissa K's and Monica K's testimony should be excluded under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994).

Defendant's intent was a principal issue in the case in light of the defense theory that Diana's injuries were a product of her own instability and depression, which led to drug use and caused her to fall and injure herself. Despite evidence that defendant had been upset with Diana that evening and called her a "whore" and a "bitch," defendant told emergency responders that Diana had tried to kill herself and that he attempted to prevent her from doing so and tried to revive her when she became unresponsive. The testimony from Melissa K. and Monica K. was probative of whether defendant acted purposefully to cause Diana's injuries. Their testimony showed that defendant was a controlling person toward women with whom he was involved in a relationship, and showed how he treated them when conflict arose, such as he had that evening with Diana. Any potential for unfair prejudice was minimized by the trial court's cautionary instruction advising the jury of the limited, permissible purposes of the evidence, and that the jury could not convict defendant because it thought he was guilty of other bad conduct. See *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). Accordingly, the trial court did not abuse its discretion in determining that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice.

The trial court determined that AH's testimony was not admissible under MCL 768.27b because she was not involved in a dating relationship with defendant, but was admissible under MRE 404(b)(1), which prohibits evidence of other bad acts "to prove the character of a person in order to show action in conformity therewith," but permits such evidence for other noncharacter

purposes. "At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *Martzke*, 251 Mich App at 289. The Michigan Supreme Court laid out the process for considering other acts evidence under MRE 404(b):

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. [*People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000) (citation omitted).]

Thus, evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Although AH was not involved in a dating relationship with defendant, her testimony indicated that her conflict with defendant arose because defendant was involved in a relationship with AH's friend, and defendant believed that AH was interfering in that relationship. AH's testimony was relevant to show the manner in which defendant sought to control his relationships with women, and to show how defendant reacted to conflicts with women, or to perceived threats to his relationships with women. The testimony also was probative of defendant's state of mind on the night Diana died, and whether he acted purposefully in causing her injuries, particularly in light of the evidence that defendant had argued with Diana earlier that night and was upset that she had given her telephone number to some of the building's staff. Defendant's intent and the purposefulness of his conduct were principal issues in the case, because he told emergency responders that he had attempted to prevent Diana from killing herself and struck her only in an attempt to revive her after she became unresponsive. Again, any potential for unfair prejudice was minimized by the trial court's cautionary instruction advising the jury of the limited, permissible purposes of the evidence. See *Martzke*, 251 Mich App at 295. Because AH's testimony was admitted for permissible, noncharacter purposes, and any prejudicial effect did not substantially outweigh its probative value, the trial court did not abuse its discretion in admitting AH's testimony under MRE 404(b)(1).

IV. EXCLUSION OF TWO EMAIL MESSAGES

Defendant next argues that the trial court erred by excluding two email messages that were sent to defendant from Diana's email address. Defendant offered the messages to support his theory that Diana was depressed, unstable, and prone to abuse drugs. The trial court did not disagree that the messages were relevant to the purpose for which they were offered, but rather excluded them because they could not be authenticated as having actually been written and sent by Diana. Whether evidence has been properly authenticated for admission is within the sound

discretion of the trial court. *People v McDade*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307597, issued June 18, 2013), slip op at 4. A trial court's decision whether to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

Authentication of evidence is governed by MRE 901. As this Court recently explained in *McDade*, ___ Mich App ___, slip op at 5:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). An example of authentication or identification that conforms to the requirements of MRE 901(a) is "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). "It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility." *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). Further, "a trial court may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible." *People v Barrett*, 480 Mich 125, 134; 747 NW2d 797 (2008) (emphasis in original). Here, Deputy McLain testified that he passed the notes at issue between Stafford and Kellumn, while Detective Hecht testified that Kellumn had indicated that he passed the notes to and from defendant and that defendant actually wrote the second note. This was sufficient to establish a foundation under MRE 901 for purposes of all three letters. *People v Roby*, 145 Mich App 138, 141; 377 NW2d 366 (1985).

Here, defendant sought to present the two email messages as evidence of Diana's state of mind. To satisfy the authentication requirement under MRE 901(a), defendant was required to present evidence sufficient to support a finding that the proffered evidence was what defendant, as the proponent of the evidence, purported it to be, namely, email messages actually written and sent by Diana. MRE 901(b) recognizes that evidence may be authenticated in different ways. Here, for example, defendant could have satisfied the authentication requirement through testimony of a witness with knowledge, MRE 901(b)(1), or by relying on distinctive characteristics, taken in conjunction with the circumstances, that support a finding that the email messages were written and sent by Diana, MRE 901(b)(4). Once a proper foundation has been established, any weaknesses or doubts about the evidence are matters for the jury to decide. *Berkey*, 437 Mich at 52; see also *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994) (deficiencies in the chain of custody go to the weight afforded the evidence, not its admissibility).

On appeal, defendant principally argues that under MRE 104, he should have been permitted to testify at a separate hearing outside the jury's presence to authenticate the email messages. However, defendant fails to explain how his testimony could have satisfied the authentication requirement. The trial court agreed that defendant could authenticate his *receipt* of the email messages, but concluded that his testimony was not necessary for that purpose because the evidence was not being offered to show defendant's knowledge or state of mind, but

rather to show Diana's state of mind. The trial court properly concluded that, given this purpose of the evidence, authentication required a showing that the email messages were actually written and sent by Diana, not that they were received by defendant. Defendant does not explain how he could have authenticated the emails as having been written and sent by Diana, and he did not provide an offer of proof on this issue at trial.[4] See MRE 103(a)(2). Without an offer of proof explaining what testimony defendant could have provided to satisfy the authentication requirement, there is no basis for concluding that the trial court erred by failing to conduct a preliminary hearing on this issue outside the jury's presence. Further, because there was no other evidence to support a finding that the proffered email messages were actually written and sent by Diana, the trial court did not abuse its discretion by excluding the evidence for lack of authentication.

V. TELEPHONE CALLS

Defendant next argues that the trial court abused its discretion by permitting DeMayo to testify about his telephone conversation with defendant late at night on March 10, 2010, and by admitting DeMayo's recorded telephone conversation to the Waterford Police Department that was made shortly after his telephone call with defendant.

We disagree with defendant's argument that his telephone conversation with DeMayo should have been excluded because it was irrelevant or unduly prejudicial. The call was made at approximately 11:30 p.m., less than seven hours before defendant called 911 to report Diana's injuries. During the call, defendant was loud, abusive, and demeaning, and he threatened to forcibly sodomize Diana because defendant was "pissed at" DeMayo. Defendant's statements during the call were relevant to show his demeanor during the time frame close to Diana's death, and were probative of defendant's intent to commit torture. Defendant also commented during the call that he had possession of Diana's telephone, which was probative of whether defendant forcibly restricted or confined Diana within his apartment, another necessary element of torture. Because this evidence involved events shortly before Diana's death and was probative of essential elements of the crime of torture, the trial court did not abuse its discretion in admitting it.

The fact that the substance of this evidence may have been damaging does not mean that the evidence should have been excluded. Defendant relies on *People v Goddard*, 429 Mich 505,

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[4] Although defendant could have identified the sender's email address as Diana's email address, defendant's testimony was not necessary for that purpose because another witness had already identified Diana's email address. Moreover, the trial court had already ruled that the identification of Diana's email address was insufficient to meet the authentication requirement, because the mere use of Diana's email address did not mean that Diana was the person who actually wrote and sent the email messages, and defendant does not challenge that determination on appeal. We note, however, that persuasive authority supports the trial court's determination that reliance only on an email address from a publicly available email provider is insufficient to prove authentication. See *Jimena v UBS AG Bank, Inc*, 2011 WL 2551413 (ED Cal, 2011), aff'd 504 Fed Appx 632; 2013 WL 223131 (CA 9, 2013).

520; 418 NW2d 881 (1988), to argue that his statements to DeMayo should have been excluded under MRE 403, but *Goddard* is factually distinguishable. In that case, the defendant's prior statement was offered to prove his state of mind, but the Court concluded that the probative value of the statement was low because it was made six months before the charged offense and it involved an apparent "exercise in machismo," regarding one accomplice bragging to another about how tough he could be. *Id*. In contrast, defendant's statements here were made within hours preceding Diana's death and were highly relevant to defendant's demeanor and the events surrounding her death.

Defendant also challenges the admissibility of DeMayo's recorded telephone call to the Waterford police, in which DeMayo recounted the substance of his earlier telephone conversation with defendant. The trial court admitted DeMayo's recorded statements under MRE 801(d)(1)(B), which provides that a statement is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" However, "a consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001), quoting *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Before trial, it was shown that the defense intended to challenge the substance of the telephone conversation between defendant and DeMayo by suggesting that DeMayo had fabricated or at least embellished the substance of the conversation. DeMayo's recorded statements were made shortly after his telephone calls with defendant, and before he knew that Diana had been injured or killed. Thus, they were made before any motive to fabricate would have arisen. The trial court did not abuse its discretion in finding that the recorded statements were admissible under MRE 801(d)(1)(B).

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that reversal is required because he was denied the effective assistance of counsel. Because defendant did not raise an ineffective assistance of counsel claim in the trial court and this Court denied defendant's motion to remand on this issue,[5] our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, to the extent that defendant relies on evidence beyond the available record, we shall consider defendant's submitted evidence to determine whether remand for an evidentiary hearing might be appropriate. See *People v Moore*, 493 Mich 933; 825 NW2d 580 (2013).

To establish ineffective assistance of counsel, defendant has the burden of showing that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation so prejudiced defendant that he was denied a fair trial. *Pickens*, 446 Mich at 338. Defendant must overcome the presumption that the challenged action might be considered sound

[5] *People v Dabish*, unpublished order of the Court of Appeals, issued October 17, 2011 (Docket No. 301622).

trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant has the burden of producing factual support for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that defense counsel was ineffective for failing to call Felicia Able, an employee at the apartment building where the offense occurred, as a witness. According to her affidavit, Able brought room service to defendant's apartment on the night Diana was killed. Able was at the apartment twice between 12:00 a.m. and 1:00 a.m., and did not observe any indication that Diana was being confined or mistreated during her visits. According to defendant, he asked defense counsel to interview and call Able as a witness, but Able asserted that she was not interviewed or contacted by defense counsel.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "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; 465 NW2d 569 (1990).

Able's affidavit establishes that there were no indications that Diana was being confined or mistreated as late as 1:00 a.m. on the day she died. However, other testimony was presented at trial that defendant and Diana were trying to locate a locksmith during this same time period because Diana had locked her keys inside her vehicle. The last call to a locksmith was made at 12:46 a.m. Further, evidence was presented that it was not until 3:19 a.m. that a "hang-up" call was made from defendant's telephone to 911, and it was not until after 5:00 a.m. that defendant began calling others for help. Defendant did not place his 911 call that led to emergency assistance until 6:19 a.m. Given this timeline, and the existence of other evidence suggesting that Diana had not yet been injured during the timeframe of Abel's visits, Abel's testimony would not have provided defendant with a substantial defense. Therefore, defendant has not shown that defense counsel was ineffective for not calling her as a witness.

Defendant next argues that defense counsel was ineffective for failing to investigate defendant's email, telephone, and social media accounts for messages from the victim that could have been offered as evidence. Defendant argues that such messages could have supported his claim that he was not involved in a romantic relationship with Diana, and that Diana was depressed and suicidal. As indicated previously, however, defense counsel did attempt to offer two email messages that he allegedly received from Diana, but the trial court would not admit them because they could not be authenticated as having actually been written and sent by Diana. The fact that counsel attempted to offer these email messages indicates that some investigation of defendant's email records was conducted. In his supporting affidavit, defendant merely asserts that his telephone, email, and Facebook records could contain information regarding the nature of his relationship with Diana and the fact that she was unstable and suicidal, but defendant does

not identify any specific records or their substance, and thus has not shown that counsel was ineffective for failing to present favorable evidence. Defendant's affidavit also fails to explain how counsel could have avoided the authentication problem. Accordingly, this ineffective assistance of counsel claim cannot succeed. Further, because defendant's offer of proof does not identify any specific evidence that could have helped his case, he has not demonstrated that he is entitled to an evidentiary hearing on this issue. *Hoag*, 460 Mich at 6.

Defendant argues that defense counsel was ineffective for failing to impeach AH's testimony that defendant had physically assaulted her. In his supporting affidavit, defendant asserts that he informed defense counsel that either the police report of that matter or the testimony of the responding police officer would indicate that he never assaulted AH. However, it is not apparent from the record that defense counsel failed to investigate that information, or that it actually exists. Defendant's offer of proof does not include any police report or an affidavit from the responding police officer. Thus, there is no basis for concluding that defense counsel was ineffective. Further, because defendant has not presented an appropriate offer of proof in support of this claim, he has not demonstrated that he is entitled to an evidentiary hearing on this issue. *Id.*

Defendant also argues that defense counsel should have presented medical evidence that he suffered from panic attacks, which would have explained why he failed to promptly seek medical assistance when Diana lost consciousness. Again, however, defendant does not identify any specific medical evidence that could have supported this claim. Therefore, he has not established the necessary factual support to succeed on this ineffective assistance of counsel claim or to entitle him to an evidentiary hearing on the issue. *Id.* Furthermore, it is clear from the record that the jury was aware that defendant had been prescribed Klonopin to treat panic attacks and anxiety. In addition, there was testimony that defendant was bipolar, and that he had been drinking and used marijuana, which could have explained why defendant did not act promptly upon realizing that Diana had lost consciousness. Given this evidence, defense counsel reasonably may have elected not to present additional evidence of defendant's medical history as a matter of trial strategy, because it might have opened the door to unfavorable evidence about defendant's own stability. Defendant has not overcome the presumption of sound trial strategy. *Tommolino*, 187 Mich App at 17.

Defendant next argues that defense counsel was ineffective for failing to call witnesses who could have testified that he did not have a romantic relationship with Diana, and thus had no reason to be jealous if Diana was interested in other men, such as staff persons at the apartment building. Again, however, defendant has not provided the names of any witnesses or submitted witness affidavits summarizing their proposed testimony. Without this evidence, he cannot show that the failure to call these witnesses deprived him of a substantial defense, and he has not demonstrated the necessary factual support to entitle him to an evidentiary hearing on this issue. *Hoag*, 460 Mich at 6.

Defendant next argues that counsel was ineffective for failing to request either a second autopsy on Diana or further testing to determine the level of Klonopin in her system at the time of her death. Defendant's mere assertion in his affidavit that he made these requests to defense counsel is insufficient to establish that counsel was ineffective for not making these requests. *Id.* Defense counsel did call a medical expert, Dr. Ljubisa Dragovic, to testify regarding the autopsy

results. Defendant has not submitted any affidavit or other offer of proof from a medical expert indicating that a second autopsy or second toxicology analysis was reasonably likely to produce new evidence favorable to the defense. Therefore, this ineffective assistance of counsel claim cannot succeed. *Id*.

Next, although defendant argues that defense counsel was ineffective for not objecting to portions of the prosecutor's closing argument, he does not specify which portions were objectionable. That deficiency alone precludes relief with respect to this claim. *Id*. Moreover, we addressed defendant's prosecutorial misconduct claims in section VII, *infra*, and have determined that the prosecutor's conduct either was not improper or did not prejudice defendant's right to a fair trial. Therefore, even assuming that some objection could have been made, defendant was not prejudiced by counsel's failure to object.

Defendant lastly argues that defense counsel was ineffective for failing to impeach DeMayo's testimony "on several grounds, including the fact that his daughter was estranged from him, [and] that he was not at all devoted to her (or even to her dog, as he claimed)." Again, however, defendant fails to identify what specific impeachment evidence existed that was not presented. Accordingly, defendant has failed to support this ineffective assistance of counsel claim or to establish that remand for an evidentiary hearing on this issue is warranted. *Id*.

In sum, the record does not support defendant's argument that he was denied the effective assistance of counsel. Further, because defendant has not established the necessary factual support for his various claims, remand for an evidentiary hearing on this issue is not warranted.

VII. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor's conduct denied him a fair trial. Defendant did not object at trial to most of the challenged conduct. Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Claims of prosecutorial misconduct[6] are decided case by case, and the challenged conduct must be viewed in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Where the issue was not preserved by objection in the trial court, review is limited to plain error affecting the defendant's substantial rights. *Abraham*, 256 Mich App at 274. This Court will not reverse if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction upon request. *People v Joezell Williams II*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

[6] This Court sympathizes with plaintiff's concern over the use of the term "misconduct" in reference to claims of prosecutor error that do not rise to violations of the rules of professional conduct. See, e.g., MRPC 8.4. However, as the phrase "prosecutorial misconduct" has acquired the status of a term of art in our jurisprudence, see e.g, *People v Hammond*, 394 Mich 627, 630; 232 NW2d 174 (1975), we use that term to remain consistent with our prior caselaw.

A prosecutor is afforded great latitude during closing argument. The prosecutor is permitted to argue the evidence and make reasonable inferences arising from the evidence in support of her theory of the case. *Bahoda*, 448 Mich at 282. While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when the evidence supports it, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). However, a prosecutor may not make a statement of fact that is unsupported by evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). A prosecutor must refrain from making prejudicial remarks. *Bahoda*, 448 Mich at 283. It is improper for a prosecutor to vouch for the credibility of a witness or to suggest that she has some special knowledge about a witness's truthfulness. *People v Cain*, 299 Mich App 27, 43; 829 NW2d 37 (2012), lv pending. A prosecutor also may not urge the jury to convict based on a civic duty, *Abraham*, 256 Mich App at 273, or invoke the prestige of her office, *Matuszak*, 263 Mich App at 54-55. Where a prosecutor's comments are responsive, they must be considered in light of the defense arguments raised. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where the remarks are made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

The record does not support defendant's argument that the prosecutor improperly elicited testimony related to the investigation of the case or to her own involvement with witnesses in order to invoke the weight of her office and thereby bolster the weight and strength of her witnesses and evidence. Although Officer Timothy Firchau offered testimony that some of his requests for warrants were approved by prosecutors or a judge, the prosecutor's questions, examined in context, were not directed at eliciting who approved the search warrants for the records, or even that the warrants had been approved by some other person. Firchau volunteered that information in his responses, and the prosecutor did not thereafter comment on the responses. Viewed in context, the prosecutor's questions were not intended to interject her role in this case or the prestige of either her office or others who were involved in procuring the search warrants. Defendant has not established that this brief questioning affected his substantial rights.

Defendant also complains that the prosecutor asked one witness whether he recognized the prosecutor as a past member of the gym where the witness worked. Defendant does not explain how he was prejudiced by this testimony. Even if it was unnecessary to elicit this brief testimony, there is no basis for concluding that it was prejudicial to defendant.

Defendant also argues that it was improper for the prosecutor to elicit from two witnesses that they previously had met with the prosecutor and given statements. Defendant did not object to this testimony at trial and he does not explain on appeal why the prosecutor's questioning was improper. The prosecutor merely elicited factual information that was intended to provide context for the witnesses' trial testimony or interest in testifying. Because defendant does not explain why the prosecutor's questions were improper, he has not satisfied his burden of establishing a plain error, or shown that his substantial rights were affected.

Defendant argues that it was improper for the prosecutor to state in her rebuttal closing argument that she had never been involved in a relationship in which she found it necessary to obtain a personal protection order against someone. Even if it was improper for the prosecutor to

comment on her own personal relationships, her brief remark did not affect defendant's substantial rights. The remark was responsive to defense counsel's argument that relationship discord is not unusual. It appears that the prosecution was trying to make the point that defendant's history of relationships involved more than discord, but rather conduct serious enough to cause others to seek personal protection orders against him, which was a proper argument supported by the evidence. Considered in this context, the prosecutor's isolated remark did not affect defendant's substantial rights.

Defendant also argues that the prosecutor improperly attempted to use Dr. Dragovic's comments about family matters to discredit his testimony. We disagree. Because Dr. Dragovic had interjected family matters into his testimony, that was a proper subject for comment by the prosecutor. *Bahoda*, 448 Mich at 282. The significance of that testimony, if any, was a matter for the jury to decide.

Defendant argues that it was improper for the prosecutor to elicit testimony about law enforcement's efforts to locate defendant, because he had voluntarily turned himself in to the police. Even if the testimony was only marginally relevant, it is not apparent that it rose to the level of misconduct. It was part of the history of this case and the investigation. Nothing in the testimony inaccurately suggested that defendant had fled. The testimony only indicated that the police had taken preventative action to notify border agents and others of the warrant, to prevent defendant from fleeing the country. The jury was otherwise appraised that defendant had voluntarily turned himself in to the police. Therefore, this issue does not require reversal.

Defendant argues that it was improper for the prosecutor to question his mother, Nicole Dabish ("Dabish"), about her assistance in contacting attorneys for defendant, and about defendant's prior conviction for driving under the influence of intoxicating liquor ("DUI") and his stay at a rehabilitation facility. Defendant does not explain why the prosecutor's questions regarding Dabish's efforts to assist defendant with his defense were improper. At trial, Dabish provided testimony regarding a telephone call that she had received from defendant shortly before defendant's 911 call, Dabish's arrival at defendant's apartment that morning, and how Dabish accompanied defendant to the hospital where Diana was taken. Testimony also indicated that Dabish may have told doctors that Diana was depressed, had abused drugs, and had fallen. The testimony regarding Dabish's relationship with defendant and her efforts to assist defendant with his defense was relevant to her credibility. Therefore, defendant has not established plain error with respect to that testimony. The record shows that the trial court appropriately responded to prevent any improper injection of defendant's prior DUI conviction, including by instructing the jury to disregard a question about DUIs. The court also sustained a defense objection to the related court-ordered treatment. The trial court's handling of this matter protected defendant's substantial rights, thereby curing any prejudice. *Bahoda*, 448 Mich at 266-267.

Defendant also complains about the prosecutor's conduct during the testimony of Dr. Dragovic; specifically, defendant argues that the prosecutor's repeated objections were designed to disrupt the flow of the direct examination. Viewed in context, the record does not support defendant's argument that the prosecutor's conduct rose to a level of misconduct. Many of the prosecutor's objections were sustained by the trial court, and a motion in limine was also decided in the prosecutor's favor. It was not improper for the prosecutor to raise valid objections to

testimony. Although some additional objections were overruled, and there were occasional bench conferences, the trial court did not find that any objections were made in bad faith and found that they did not interfere with the flow of the trial. Defendant has not shown that the prosecutor's conduct denied him a fair trial.

Defendant also argues that the prosecutor improperly attacked Dr. Dragovic in her closing argument. We disagree. Although defendant accuses the prosecutor of "overreaching," the prosecutor was entitled to comment on Dr. Dragovic's testimony and provide reasons why it should not be accepted. Moreover, defendant's arguments are based on isolated remarks, without considering their surrounding context. Viewed in context, the prosecutor provided reasons, grounded in the evidence, for why Dr. Dragovic's testimony should not be accepted. The prosecutor's remarks were not improper.

In sum, defendant has not shown that the prosecutor's conduct, whether considered singularly or cumulatively, denied him a fair trial.

VIII. EVIDENCE OF MARIJUANA-GROWING OPERATION

Defendant next argues that the trial court abused its discretion when it permitted the jury to hear testimony that a marijuana-growing operation was discovered at defendant's Waterford apartment. We disagree.

The defense argued that Diana's use of marijuana on the night she died may have affected her condition and contributed to her injuries. Although marijuana was detected in Diana's system at the time of her death, evidence indicated that marijuana can remain in a person's system for several days. The defense therefore relied on evidence that Diana's clothing smelled of marijuana to support its theory that Diana had used marijuana on the night she died. The evidence of the marijuana-growing operation at defendant's Waterford apartment was relevant to present an alternative explanation for the marijuana smell on Diana's clothing. MRE 401. Further, the evidence was not inadmissible under MRE 404(b)(1), because it was not offered to prove defendant's character as a marijuana grower, but rather to explain the source of the marijuana smell on Diana's clothing, a proper, noncharacter purpose. The prosecutor's failure to provide prior notice of her intent to offer this evidence as required by MRE 404(b)(2) was not fatal, because the rule provides that pretrial notice may be excused on good cause shown. Because the need for the evidence did not arise until defense counsel questioned Officer Lenton about the marijuana smell on Diana's clothing, good cause existed for excusing the lack of pretrial notice. The trial court did not abuse its discretion in admitting this evidence.

IX. DEFENDANT'S EXPERT WITNESS TESTIMONY

Defendant lastly argues that the trial court erroneously imposed limitations on the scope of Dr. Dragovic's expert testimony. We disagree.

The record does not support defendant's argument that the trial court's restrictions on Dr. Dragovic's use of legal terms or definitions infringed on defendant's right to offer testimony on ultimate issues to be decided by the jury. See MRE 704. It is improper for a witness to testify regarding matters of law because it is the trial court's responsibility to find and interpret the law. *People v Lyons*, 93 Mich App 35, 45-46; 285 NW2d 788 (1979). A witness also may not testify

regarding the criminal responsibility, or the guilt or innocence, of an accused. *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). The trial court merely prohibited Dr. Dragovic from offering testimony in the form of legal conclusions. It did not prohibit him from offering his medical opinions as they related to the legal issues in the case. Defendant was permitted to elicit Dr. Dragovic's opinion testimony that Diana's injuries to her face and body did not account for the injuries to her head, and did not indicate "a pattern of severe or prolonged or systematic or repeated assault and beating." Defendant has not shown that the trial court impermissibly restricted the scope of Dr. Dragovic's testimony.

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray