STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2016
v	No. 328543 Saginaw Circuit Court
ARRON MURRY, Defendant-Appellant.	LC No. 15-040870-FC

Before: BECKERING, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Defendant, Arron Murry, appeals by right from his convictions following a jury trial of one count of first-degree felony murder, 750.316(1)(b), one count of assault with intent to commit criminal sexual penetration, MCL 750.520g(1), one count of assault with intent to commit criminal sexual conduct in the second degree (CSC II), MCL 750.520g(2), one count of kidnapping, MCL 750.349, one count of carrying a dangerous weapon with unlawful intent, MCL 750.226, and one count of torture, MCL 750.85. The trial court sentenced defendant to concurrent prison terms of life for the first-degree felony murder conviction, 152 months to 50 years for the assault with intent to commit criminal sexual penetration conviction (as a fourth-habitual offender, MCL 769.12), 76 months to 50 years for the assault with intent to commit CSC-II conviction, 900 months to 125 years for the kidnapping conviction, 76 months to 50 years for the carrying a dangerous weapon with unlawful intent conviction, and 900 months to 125 years for the torture conviction. We affirm.

I. FACTS

The victim's partially nude body was found on the floor of a barn. The victim's left hand was badly burned, making obtainment of fingerprints or foreign DNA impossible. Her right hand was partially burned, as was her right pelvis. She also had drag marks on the front and back of her body, and an injury to the back of her head. The medical examiner identified the cause of death as stab wounds to the victim's chest and neck. Two stab wounds went through the victim's sternum and perforated her heart. The medical examiner opined that the victim was stabbed with a Philips screwdriver, and explained that it would take a large amount of force to perforate the heart with a screwdriver.

Video captured the victim entering defendant's vehicle at around 9:24 a.m. on the day she was killed. Defendant testified that he dropped the victim at a store and then returned home at around 10:00 or 10:30 a.m. Cellular phone records and an examination of a computer found in defendant's home contradicted his contention that he was home at this time. Tire track evidence at the scene of the murder was consistent with the type of tires on defendant's BMW. Michigan State Police Officer Hilary House described the building where the victim was found as a place where people dump their trash and where the owner of the building stores his junk. Substantial pools of blood were found in two locations, and a trail of blood was found that went along for some distance.

The prosecution filed a pretrial motion to offer other-acts evidence against defendant pursuant to MRE 404(b), arguing that the evidence relates to "[d]efendant's motive, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, and absence of mistake or accident." During the motion hearing, the prosecutor argued that because defendant denied killing the victim, the other-acts evidence was relevant to help the jury understand how defendant reacted in the past when his sexual advances were rejected. The trial court allowed the testimony of three of the prosecution's five identified other-acts witnesses, concluding that admission of the evidence "would be proper to show [defendant's] identity as a murderer, his intent, his motive, and his system of doing an act when frustrated, and rejected in sexual acts, it always seems to lead to violence. And I think that is his system of doing these acts, and his motive."

II. ANALYSIS

A. OTHER-ACTS EVIDENCE

Defendant first argues that the trial court abused its discretion by admitting other-acts evidence that was thinly disguised propensity evidence. We review a trial court's decision to admit or exclude evidence for an abuse of discretion, and we review de novo whether a rule of evidence precludes the admission of evidence. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "A trial court abuses its discretion when it makes an error of law in the interpretation of a rule of evidence." *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015).

MRE 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided . . . ." Evidence is relevant if it has a tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Generally, "[e]vidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Engelman*, 434 Mich 204, 211; 453 NW2d 656 (1990), citing MRE 404(a). However, such evidence may be admissible for other purposes pursuant to MRE 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[1]

MRE 404(b) limits the admission of other-acts evidence "to avoid the danger of conviction based on a defendant's history of other misconduct rather than on the evidence of his conduct in the case in issue." *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998) (quotation marks and citation omitted). Other-acts evidence is admissible under MRE 404(b) if it: (1) is offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime; (2) is relevant to an issue or fact of consequence at trial; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 111 (1993), amended on other grounds 445 Mich 1205 (1994). "In addition, the trial court may, upon request, provide a limiting instruction under [MRE] 105." *Id*. at 75.

The MRE 404(b) evidence at issue here is the testimony of Tina Gray, Jerome Slaten, and Cheryl Grigg. Gray testified that defendant used to pay her for sex and that, on one occasion when he had trouble achieving an erection, defendant threatened her and tried to restrain her and force her to perform oral sex, and that she became afraid that defendant would harm her physically. Slaten testified that during a period when he and defendant had lived together, defendant persisted in making unwanted sexual advances toward him, and that, when Slaten refused his advances, defendant ambushed him, broke his arm, and hit him multiple times in the head with a padlock, causing a wound that required seven stitches to close. Grigg testified that in 1973, when she was 15 years old and knew defendant from school, she met defendant on the street and, after a brief conversation, he pulled her inside a Catholic Church, where he violently raped and beat her, and that, forty years later, she is still afraid of him. After Gray and Grigg testified, and again during final instructions to the jury, the trial court cautioned the jury that it could consider the other-acts testimony only to determine who committed the charged crimes,

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[1] Similarly, MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

and whether defendant had a motive to commit the crimes, acted specifically and purposefully in committing the crimes, or used a characteristic plan or scheme. The trial court further instructed the jury that it could not consider the evidence to determine whether defendant was a bad person or one likely to commit crimes.

We find merit in defendant's contention that, although the prosecution sought to admit the above-described evidence pursuant to MRE 404(b) in order to show identity through a scheme, plan, or system of doing an act, motive, and intent, the evidence merely established that defendant reacted violently to sexual rejection and that he had acted in conformity with his character in the instant case. Where MRE 404(b) testimony is introduced to prove identity, "[t]he other acts and the charged crimes "must involve such distinctive, unique, peculiar or special characteristics as to justify a reasonable juror in inferring that they are the handiwork of the same person." *People v Perry*, 172 Mich App 609, 619; 432 NW2d 377 (1988). In this case, however, the testimony of Gray, Slaten, and Grigg that defendant became violent when they rejected his sexual advances revealed no distinctive, unique, or peculiar characteristics of defendant's reactions that would earmark the charged offenses as uniquely his handiwork. *Id*.; see *People v Anderson*, 111 Mich App 671; 314 NW2d 723 (1981) (where other-acts evidence showing that the defendant assaulted women who alighted from a bus after dark, threw them to the ground in a secluded area, demanded money, put his hand in their panties, and bit them established a modus operandi sufficiently singular to identify the defendant as the perpetrator of the similarly executed charged crime). The violent responses described by Gray, Slaten, and Grigg were opportunistic, related to the circumstances, and too dissimilar to each other and to the charged crimes to indicate the "signature" of a single actor to show identity through a scheme, plan, or system. *Perry*, 172 Mich App at 619.

Motive is generally relevant to show the intent necessary to prove murder, *People v Herndon*, 246 Mich App 371, 412–13; 633 NW2d 376, 402–03 (2001), and evidence of motive is generally admissible in a criminal trial, *People v Jackson*, 77 Mich App 392, 400; 258 NW2d 89 (1977). For evidence to be properly admitted as motive evidence, it must be validly connected to the charged crimes. See *People v Williams*, 134 Mich App 639, 641; 351 NW2d 878 (1984); see e.g., *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995) (finding proffered evidence of the victim-wife's statements highly relevant and more probative than prejudicial where the statements illustrated extensive marital discord and provided motive for the defendant-husband to kill her); *People v Orr*, 275 Mich App 587, 591-593; 739 NW2d 385 (2007) (evidence of the defendant's prior shooting of the victim five months earlier was relevant in first-degree murder trial to establishing motive, and premeditation and deliberation); *People v Kvam*, 160 Mich App 189; 408 NW2d 71 (1987) (finding evidence that the defendant engaged in criminal sexual conduct against three victims prior to their murders admissible where the evidence was highly probative both of the defendant's motive for killing the victims and of the element of premeditation, and prejudicial effect was minimized by the court's cautionary instruction). The sole connection the prosecution sought to establish between the evidence at issue and the charged crimes was that it showed that sexual rejection "sets [defendant] off into a violent rage[,]" from which the jury could infer that, when the victim rejected defendant's advances, defendant acted in conformity with his propensity for violence, which resulted in the charged crimes.

"Other-acts evidence may be used to disprove lack of accident or innocent intent with regard to the charged event." *People v Mardlin*, 487 Mich 609; 790 NW2d 607 (2010); see e.g., *VanderVliet*, 444 Mich at 75-83 (affirming as admissible witnesses' testimony regarding the defendant's prior sexual contact because the testimony negated the reasonable assumption that the defendant's sexual contact with the victim was accidental rather than for purposes of sexual gratification). In this case, however, the prosecution connected the admissibility of the evidence at issue to show intent with the evidence's admissibility to show identity and motive, explaining at the motion hearing, "[h]ere we have a history and a pattern that shows it was the defendant, identifies him as being the person, based on motive, and also illustrating his intent." But, as we indicated above, the only "pattern" to emerge from the subject testimony, and the one the prosecution sought to establish, is that defendant is prone to react violently in the face of sexual rejection, and that this propensity to violence supplied defendant's motive for commission of the charged crimes. Thus, with regard to intent, the clear inference is that, because defendant has reacted with intentional violence in the past, he intended to commit the acts underlying the charged crimes.

We are mindful that MRE 404(b) is a rule of inclusion, not of exclusion; it "provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character." *Mardlin*, 487 Mich at 616. Our review of the record convinces us, however, that, notwithstanding the prosecution's argument to the contrary, the testimony of Gray, Slaten, and Grigg was "simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character." *Id*. The prosecution sought to admit the disputed evidence to establish defendant's propensity to respond to sexual rejection with threats and violence, and to show how defendant acted in conformity with that propensity to commit the charged crimes. This is classic propensity evidence that relies on an impermissible character inference to connect other-acts evidence to an ultimate fact. *Jackson*, 498 Mich at 258-259, 263-264; see also *VanVliet*, 444 Mich at 74 (stating that for other-acts evidence to be admissible, it must first be offered for a purpose other than to prove the defendant's character or propensity to commit a crime). Accordingly, we conclude that the trial court abused its discretion in admitting the testimony of Gray, Slaten, and Grigg as MRE 404(b) evidence.

Having concluded that the trial court improperly admitted the testimony at issue, the question becomes whether the trial court's error was harmless. *McGhee*, 268 Mich App at 620. "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Roscoe*, 303 Mich App 633, 639; 846 NW2d 402 (2014), quoting *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (quotation marks and citation omitted).

After carefully examining the evidence, we conclude that, even though the testimony at issue was improperly admitted, defendant has not carried his burden of establishing that it was more probable than not that the alleged error affected the outcome of the trial, in light of the untainted evidence. *Id*.

The jury heard that no DNA evidence linked defendant to the victim, and that the search of defendant's house did not produce shoes that matched the impressions left at the scene of the crime.[2] Investigators failed to recover the victim's cell phone and shopping bag or the screwdriver used to inflict the lethal wounds. However, in addition to the video, cell phone, and tire track evidence described above, the jury also heard evidence that the search of defendant's house revealed wooden matches and lighter fluid consistent with the type of accelerant used to douse and burn the victim's hands and pelvis.

In addition, the jury heard an audio recording of defendant's police interview in which defendant repeatedly denied knowing the victim, even after the police interviewer urged defendant to tell the truth and told him that they had video footage of him and the victim together. Only after the investigator explained the ease and inevitability of DNA transfer did defendant admit knowing the victim. Defendant insisted that he and the victim never telephoned one another, but later recalled that she had called him to store her cell phone number in his cell phone. Defendant maintained that, as he pulled into the driveway at Davenport Manor, the victim looked over at him, smiled, and asked for a ride. However, once the investigator pointed out that the video showed the victim poised to go into the building with a shopping bag when defendant pulled the wrong way into the driveway and initiated contact, defendant said he could not remember whether the victim had been going in or coming out of the building when he first saw her.

After finally admitting that he knew the victim, defendant consistently maintained that he did not kill her. He said that he gave the victim a ride to a Circle K store, for which she was supposed to give him $5. However, when they arrived at the store and it was clear that she was not going to give him the money, defendant said that he held onto her shopping bag, offering to return it to her in exchange for the money she owed him. According to the defendant, the victim reached through the driver's side window, flailing and slapping at him, and eventually scratching him on the neck, at which point, defendant said, he threw the bag out of the window and drove straight home. Defendant admitted that when he returned home and noticed scratching on his neck, it caused him concern about being linked to the victim and whatever it may have appeared to others he and the victim were embroiled in outside the Circle K. Defendant told investigators that he arrived home between 10:00 a.m. and 10:30 a.m., took a shower, and played slot machines on his computer. Although he first said that he went to work around 2:00 p.m., he later remembered that he did not work that day and, after his wife returned home from work around 1:00 p.m. or 2:00 p.m., they spent the afternoon together. Analysis of defendant's cell phone records show that he called his wife at 12:53 p.m. from the vicinity of where the victim's body was found, and analysis of his computer showed no activity during the time defendant said he

[2] Police were looking for a pair of black AND1 brand athletic shoes, but did not find them at defendant's house. Video footage of defendant leaving the blood bank before picking up the victim shows that he was wearing a pair of black or dark colored dark shoes, which would be consistent with the AND1 shoes the police suspected were worn by the assailant. Police asked defendant about the shoes when defendant picked up his BMW from the police station before he had been charged, and defendant responded, "I thought you had them."

was at home playing computer slots. Ronald Stanley attended the same church as defendant and testified that, on the day after the murder, he saw defendant at church and noticed that defendant had fresh scratch marks running horizontally along the left side of his neck.

In addition, Raul Ramirez testified that he was jailed with defendant for a few months after defendant was arrested for the victim's murder, and that, over time, defendant relayed to him various details surrounding the murder. Ramirez testified that he and defendant spoke with each other every day and played games together, and that he introduced defendant to a religious program called the Forgotten Man Ministries. He testified that defendant took an interest in a series of Bible books obtained from the ministry. Ramirez testified that he and defendant discussed Psalms 32 and 51. He read to the jury what he said was a passage from Psalm 32: "Blessed is the one whose lawless acts are forgive[n]. His sins have been taken away. Blessed is the man whose sins the Lord never counts against him. He doesn't want to cheat anymore." He testified that defendant took this passage to heart. Ramirez also read Psalm 51:13: "I will teach your ways to those to commit lawless acts. And sinners will come back to you. You are the God who saves me. I have committed murder. Take away my guilt and my tongue will sing loud how right you are no matter what you do." Ramirez stated that he discussed Psalm 51:13 with defendant, and he told defendant he needed to confess his sins.

According to Ramirez, defendant would talk about fires and burning. He stated that defendant "was concerned about fingerprints. And then he was concerned about if anything was enclosed in a secluded area with a fire going would it keep going, or would it go out?" He testified that defendant wanted to confide in him but kept pushing it off, so he advised defendant that he could confess to a chaplain. According to Ramirez, after midnight one night, when everyone else was asleep, defendant confided in him:

> [Defendant] said one particular day, he didn't tell me what day, he didn't say what year; he said on particular day he went to the blood bank. Okay. He met a girl. He said that she smelled good, good looking, you know. . . .
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> He had picked her up. They had went to the store. . . . Went there, got a drink, okay? They went riding around, okay? He said he made an advance toward her and something just clicked. He said it didn't mean to happen, you know. And I said: What do you mean? He made advances toward her. One thing escalated to another . . .
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> * * *
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> Everything escalated after one another. She had scratched him. They had pulled into Sole Survivors. She had jumped out the car. He remembered that he had a screwdriver on the side of the car. He had grabbed it and went after her and had swung it and stabbed her on the neck. . . .
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> * * *

> He proceeded to go after her. When he tried to hit her he had punctured her. He didn't stab her, he said he just punctured toward the ribcage, okay, and it escalated from there.
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> * * *
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> After that he said he had dragged her – she ran out into an open field. He had dragged her to the barn, okay? By then he said it was too late. I said what do you mean it was too late? She was going to die anyway. Okay? He said he had dosed [sic] with something. He didn't say what, okay? He had put her in a shed, dosed her off. He had left, came back and he said he, in particular, got her purse and her cell phone. And I said well, they won't find anything. There was no blood in the car or anything like that. He said they weren't going to find anything.

Ramirez testified that he did not share this information with anyone until Detective Hilary House questioned him. Detective House testified that before she talked with Ramirez, police had not released the information that the perpetrator had delivered the fatal blows with a screwdriver.

After examining the entire case, we cannot say that the error in admitting the disputed evidence was outcome determinative. *Roscoe*, 303 Mich App at 639. Direct evidence linked defendant to the victim on the morning of the murder, and the circumstantial evidence upon which the prosecution's case rested was strong. Further, Ramirez's testimony regarding defendant's confession was extremely consistent with the facts surrounding defendant's movements prior to the crime as well as the crime itself, and his recitation of events contained crucial information that was not known to the public, implicating defendant as the actual source of the information. If believed by the jury, Ramirez's account of defendant's confession was highly probative, as was the audio of defendant's police interview. *Mardlin*, 487 Mich at 626 (noting that the jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and making credibility determinations"). The inadmissible MRE 404(b) testimony constituted a small fraction (24 pages) of the approximately 422 pages of transcribed testimony, and was accompanied by multiple cautionary instructions from the court and reminders from the prosecution that the evidence could not be used to conclude that defendant was a bad man who had acted in conformity with his character. Therefore, we conclude that defendant has failed to show that it is more probable than not that the improperly admitted MRE 404(b) evidence was outcome determinative. Consequently, reversal of defendant's convictions is not warranted. *Roscoe*, 303 Mich App at 639.

B. SUFFICIENCY OF EVIDENCE

Defendant next argues that the evidence adduced at trial was insufficient to support the convictions for assault with intent to commit criminal sexual conduct involving penetration, assault with intent to commit CSC-II, carrying a dangerous weapon with unlawful intent, torture, kidnapping, and first-degree felony murder. We review this issue de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). When reviewing the sufficiency of evidence in a criminal case, we consider "the evidence in the light most favorable to the prosecutor, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v*

Reese, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted).

The elements of assault with intent to commit criminal sexual conduct involving penetration are (1) an assault, and (2) an intent to commit CSC involving penetration. *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). The elements of assault with intent to commit CSC-II are: "an assault, involving force or coercion, with the specific intent to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or gratification." *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1998). See also MCL 750.520g(2); MCL 750.520c(f). "An assault is made out from an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *Nickens*, 470 Mich at 628 (quotation marks and citation omitted). For both crimes, the trial court instructed the jury that the prosecution must prove "that the defendant either attempted to commit *a battery* . . . , or did an act that would cause a reasonable person to fear . . . an immediate battery." (Emphasis added.) See M Crim JI 20.17 and 20.18. An actor's intent may be express or it may be inferred from the surrounding facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). "[I]t is not necessary to show that the sexual act was started or completed." *People v Lasky*, 157 Mich App 265, 270; 403 NW2d 117 (1987) (quotation marks and citation omitted).

"A person commits the offense of kidnapping if he or she knowingly restrains another person with intent to" "[e]ngage in criminal sexual penetration or criminal sexual contact . . . with that person." MCL 750.349(1)(c). "Restrain" means "to restrict a person's movement or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority." MCL 750.349(2). "The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." *Id*.

The elements of the offense of carrying a firearm or dangerous weapon with unlawful intent are: "(1) carrying a firearm or dangerous weapon, (2) with the intent to unlawfully use the weapon against another person." *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). See also MCL 750.226. To find a defendant guilty, "the evidence must establish that the accused departed from a location while equipped with a qualifying weapon in his possession and, at the time of departing, had the intent to use the weapon unlawfully against another person." *People v Mitchell*, 301 Mich App 282, 293; 835 NW2d 615 (2013). A dangerous weapon is defined as "a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous weapon or instrument." MCL 750.226(1). Further, "[a] dangerous weapon can also be an instrumentality which, although not designed to be a dangerous weapon, is used as a weapon and, when so employed, is dangerous." *People v Barkley*, 151 Mich App 234, 238; 390 NW2d 705 (1986). "A screwdriver used as a knife would fall into this category." *Id.*

Finally, torture occurs when "[a] person . . . , 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 . . . ." MCL

750.85(1). The term "cruel" is defined as "brutal, inhuman, sadistic, or that which torments." MCL 750.85(2)(a). Great bodily injury means "internal injury, serious burns or scalding, severe cuts, or multiple puncture wounds." However, "[p]roof that a victim suffered pain is not an element of the crime." MCL 750.85(3).

Considering "the evidence in the light most favorable to the prosecutor, [and] resolving all evidentiary conflicts in its favor," we conclude that the prosecution presented sufficient evidence from which a rational trier of fact could have found that the essential elements of the charged crimes were proven beyond a reasonable doubt. *Reese*, 491 Mich at 139. If believed, the jury could reasonably infer from Ramirez's testimony regarding defendant's confession, the medical evidence, and testimony stating that the victim was found nude from the waist up that defendant attempted to commit a battery with the intent to both sexually penetrate the victim and to engage in sexual contact with the victim for the purpose of sexual gratification. The evidence also establishes the intent element of kidnapping. If believed, a jury could reasonably infer from Ramirez's testimony and from testimony regarding scratches on defendant's neck that the victim struggled to escape defendant's restraint of her in his car. The victim's prior efforts to escape defendant permit the reasonable inference that any restraint was without her consent, and the brutality reflected in the facts leaves no doubt that force was used. Ramirez testified that defendant said that, when the victim exited his car, he grabbed a screwdriver, went after her, and stabbed her in the neck. Defendant's confession was corroborated by medical evidence that the victim's cause of death was stab wounds to the chest and neck inflicted by a screwdriver. Accordingly, there was sufficient evidence to convict defendant of the offense of carrying a dangerous weapon with unlawful intent.

In addition, the medical examiner testified that the victim was stabbed through the sternum and into her heart. He opined that it would take a large amount of force to perforate a human heart with a screwdriver. In addition to the stab wounds, there was also evidence that defendant inflicted a head injury to the victim and applied pressure to her neck before she died. Officer House described the victim's death as a "very violent, brutal death." Photographs of the victim's injuries and the condition in which she was found were introduced, and the brutality spoken of by House is evident in those photographs. It is reasonable to infer from this evidence that defendant, acting out of rage, brutally assaulted and killed the victim, which is sufficient evidence to support defendant's conviction for torture.

Finally, with the exception of carrying a dangerous weapon with unlawful intent, MCL 750.226, each of the aforementioned felonies could serve as the predicate felony for a felony-murder conviction, MCL 750.316(1)(b). The elements of felony murder are that defendant:

> (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Bulls*, 262 Mich App 618, 624; 687 NW2d 159 (2004).]

As described above, the evidence was sufficient to convict defendant of each of the charged felonies. If believed, the jury could find beyond a reasonable doubt from the video evidence, the

testimony of Ramirez and of the medical examiner, as well as other circumstantial evidence presented at trial that, during the commission of these felonies, defendant performed acts with the requisite intent that resulted in the death of the victim. *Id*. Therefore, the evidence is sufficient to support defendant's conviction for first-degree felony murder.

C. GREAT WEIGHT OF EVIDENCE

Defendant also contends that his convictions for assault with intent to commit criminal sexual conduct involving penetration and assault with intent to commit CSC-II were against the great weight of evidence. Defendant did not move for a new trial on this basis, thereby leaving the issue unpreserved. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). An unpreserved claim of error is reviewed under the plain error rule. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). To establish plain error affecting substantial rights, "three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763-765. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. 763.

Defendant's convictions for assault with intent to commit criminal sexual conduct involving penetration and assault with intent to commit CSC-II are supported by the evidence discussed above. Because of the overwhelming evidence of guilt against him, defendant has failed to demonstrate a plain error affecting his substantial rights.

D. PROSECUTORIAL MISCONDUCT

Defendant raises an unpreserved claim of prosecutorial misconduct in his Standard 4 brief.[3] Again, we review for plain error affecting substantial rights. *Pfaffle*, 246 Mich App at 288.

The role and responsibility of a prosecutor is to seek justice, not merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* A claim of prosecutorial misconduct based on the violation of a specific, enumerated constitutional right requires a court to take special care to assure that the prosecutor did not infringe upon that right. *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008). Prosecutorial misconduct can be so flagrant that it is deemed to have rendered the trial fundamentally unfair and thus to have deprived the defendant of due process. See *Id.*

Defendant alleges five instances of prosecutorial misconduct. First, he contends that the prosecutor improperly introduced graphic photographs of the victim. "Photographic evidence is

[3] A "Standard 4" brief refers to a brief filed on behalf of an indigent criminal defendant pursuant to Michigan Supreme Court Administrative Order 2004-6, Standard 4.

generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). Autopsy photographs are relevant and admissible where they "were referred to during the pathologist's testimony and were instructive in depicting the nature and extent of the victim's injuries." *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). "Photographs may also be used to corroborate a witness' testimony," and "[g]ruesomeness alone need not cause exclusion." *People v Mills*, 450 Mich 61, 76, 537 NW2d 909 (1995).

The prosecutor introduced the autopsy photographs while questioning the medical examiner, who testified that "they would definitely help" him as he went through his findings. There is no assertion by defendant that the photographs were anything but accurate factual representations of the injuries suffered by the victim. Moreover, the photographs corroborated evidence about the circumstances of the killing, including what defendant admitted to Ramirez. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 70.

Defendant also argues that the prosecutor improperly allowed his wife to testify against him. MCL 600.2162(2), referring to spousal privilege, states that, "[i]n a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent . . . ." Nothing in the record indicates that defendant's wife was coerced or forced to testify against him. Accordingly, defendant has failed to show plain error affecting his substantial rights. *Pfaffle*, 246 Mich App at 288.

Further, defendant contends that the prosecutor committed misconduct by allowing his brother, who is a police officer, to question him during his police interview. However, defendant offers no argument contending that the prosecutor was somehow involved in or orchestrated defendant's brother's questioning of defendant. Therefore, we find this claim of prosecutorial misconduct to be without merit.

Defendant also argues that the prosecutor allowed Ramirez to testify knowing full well that Ramirez had made up testimony against other inmates. "It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). "If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (quotation marks and citation omitted). Defendant does not explain how the prosecutor knowingly presented perjured testimony, and the record does not support the contention that the prosecutor knew about any alleged perjury. Thus, defendant again has failed to show plain error affecting his substantial rights. *Pfaffle*, 246 Mich App at 288.

Finally, defendant argues that the prosecutor committed misconduct by presenting a case where the phone evidence and shoe impression evidence did not demonstrate that he committed the offense. Although this is styled as an issue of prosecutorial misconduct, defendant is really arguing that the cited evidence did not prove he was guilty because it did not place him at the scene of the murder. We need not consider the validity of what the cited evidence shows and does not show, as the sufficiency of the evidence underlying defendant's convictions has already

been discussed. Moreover, that any one piece of evidence alone may not prove guilt does not undermine a verdict based on consideration of that evidence in the context of all the other evidence presented.

Moreover, any possible prejudice stemming from any improper conduct by the prosecutor was cured when the trial court instructed the jury to only consider the evidence presented in the case and that they were "free to believe all, none, or any part" of the testimony presented at trial. Again, "[j]urors are presumed to follow their instructions and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; NW2d 836 (2003).

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Donald S. Owens