

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 26, 2012

v

ANTONIO DEQUARY RAMSEY,
Defendant-Appellant.

No. 302569
Muskegon Circuit Court
LC No. 09-058680-FC

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

On appeal, defendant argues that the trial court erred in denying his request for a hearing under *Remmer v United States*, 347 US 227; 74 S Ct 450; 98 L Ed 654 (1954). According to defendant, he was entitled to a *Remmer* hearing to investigate whether the jury, upon seeing a sex offender registration receipt in deliberations, became biased and partial. Defendant also argues that the trial court erred in determining that the registration receipt was not an extraneous influence. We review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion, *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). We also review the decision whether to grant a new trial for an abuse of discretion *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

The trial court informed the parties that when it spoke to the jurors at the conclusion of trial, the jurors informed it that they had learned from an exhibit that defendant had a prior conviction for second-degree criminal sexual conduct. The exhibit was "exhibit 1," which was described as a "photograph book" of pictures taken during the investigation of the death of the victim, Andrea Parnell. Exhibit 1 contained a piece of paper entitled "Michigan Sex Offender Registration, address verification, offender receipt." According to the prosecutor, exhibit 1 was put together before trial. The prosecutor acknowledged that he was not specifically aware that the slip of paper placed in the book as a part of the returns from the search of defendant's residence was a sex offender registration receipt. The sex offender registration receipt was included in the exhibit because it was the only proof of residence for defendant that was found in

the search of defendant's house. When the prosecutor moved to admit exhibit 1 into evidence, defendant stated that he had no objection to the admission of the exhibit. At the hearing on defendant's motion for a *Remmer* hearing, defendant's counsel admitted that he stipulated to the admission of exhibit 1, but explained that he, also, failed to perceive that it included the sex offender registration receipt.

We conclude that defendant, when he consented to the admission of exhibit 1, waived the issue of whether he is entitled to relief because the jury, during deliberations, learned of his status of a sex offender. A “[d]efendant may not assign error on appeal to something that his own counsel deemed proper at trial.” *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995); see also *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003) (“[A]n appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence.”).

Regardless, the sex offender registration receipt was not an extraneous influence. The registration receipt did not come from “outside” the trial court proceedings. *People v Budzyn*, 456 Mich 77, 91-92; 566 NW2d 229 (1997). The sex offender registration receipt was included in exhibit 1, which was admitted into evidence with the consent of defendant. The jury was instructed that, in reaching a verdict, it could only consider the evidence that was properly admitted. Properly admitted evidence, the jury was instructed, included the sworn testimony of the witnesses and the exhibits admitted into evidence. Because the sex offender registration receipt was admitted into evidence as part of exhibit 1, it was evidence that the jury was allowed to consider in reaching a verdict. We acknowledge that the sex offender registration receipt was not published to the jury or testified to by a witness during trial, but this does not change the fact that the registration receipt was part of an exhibit that was admitted into evidence. Accordingly, the trial court properly concluded that the sex offender registration receipt was not an extraneous influence.

A defendant is entitled to a *Remmer* hearing when the defendant raises a “colorable claim of extraneous influence” on a juror. *United States v Davis*, 177 F3d 552, 557 (CA 6, 1999). To be entitled to a new trial under *Budzyn*, 456 Mich at 88-90, the case in which our Supreme Court articulated the analysis to determine whether an extraneous influence was error requiring reversal, a defendant must initially establish that the jury was exposed to an extraneous influence. Because the jury was not exposed to an extraneous influence, defendant was not entitled to a *Remmer* hearing or to a new trial under *Budzyn*. Accordingly, we affirm the trial court's orders denying defendant a *Remmer* hearing and a new trial.

Defendant next argues that the prosecutor, through five separate actions, failed to ensure that he received a fair trial. We review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first asserts that the prosecutor failed to ensure that he received a fair trial when the prosecutor offered no explanation other than “an unintentional mistake” for the inclusion of the sex offender registration receipt in exhibit 1 and then, in seeking the denial of relief to defendant, sought to blame defendant for his failure to manage exhibit 1. Defendant has

not supported the claim with any argument supported by legal authority. Accordingly, defendant has abandoned the claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Second, defendant claims that the prosecutor failed to ensure that he received a fair trial when the prosecutor ignored requests to investigate Jamar Frederick as a possible suspect. We are aware of no legal authority that supports defendant's claim. The job of the prosecutor is not to investigate. "[I]t is recognized that the prosecutor's job is to evaluate the evidence provided by investigators and determine whether to prosecute a crime." *People v Tesen*, 276 Mich App 134, 142; 739 NW2d 689 (2007); see also *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995) (stating that a prosecutor has no duty to search for evidence to aid the defendant). Accordingly, we reject defendant's claim that the prosecutor, upon defendant's request, was required to investigate Frederick as a suspect.

Third, defendant claims that the prosecutor failed to ensure that he received a fair trial when the prosecutor advanced contradictory testimony. A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). Knowledge of false testimony is not imputed to a prosecutor simply because the testimony of one witness conflicts with the testimony of another witness. *Id.* at 279. Here, defendant only claims that the prosecutor presented inconsistent testimony. Because defendant makes no claim that the prosecutor had actual knowledge that the testimony of any witness was false, defendant's argument that the prosecutor failed to ensure his right to a fair trial when he presented inconsistent testimony is without merit.

Fourth, defendant claims that the prosecutor failed to ensure that he received a fair trial when the prosecutor attempted to elicit testimony from the DNA expert that the expert admitted was so unorthodox that she would not be permitted to include it in her written report. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). The record provides no support for a claim that the prosecutor acted with bad faith in attempting to obtain the unorthodox testimony from the DNA expert. Regardless, because the prosecutor chose not to proceed with the line of questioning after defendant objected, the prosecutor's attempt to elicit the testimony did not constitute plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763.

Fifth, defendant asserts that the prosecutor failed to ensure that he received a fair trial when the prosecutor opposed his request for the appointment of an expert. Defendant makes no argument supported by legal authority that a prosecutor, by arguing that a defendant is not entitled to the appointment of an expert because the defendant has not met the standards established by case law, has abandoned the duty to ensure that the defendant receives a fair trial. Accordingly, defendant has abandoned the claim. *Kelly*, 231 Mich App at 640-641. Regardless, the trial court granted defendant's request for \$4,500 to secure expert analysis. Because defendant's request was granted, the prosecutor's opposition to the request did not constitute plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant also argues that the trial court erred in admitting "grizzly" autopsy pictures of Parnell. According to defendant, because he did not dispute the manner of Parnell's death, the only purpose the pictures served was to inflame the passions of the jury. We review a trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216.

All the elements of a crime are at issue when a defendant enters a plea of not guilty. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Regardless of whether a defendant specifically disputes or offers to stipulate to any of the elements of a charged crime, the prosecution is required to prove each element of the crime beyond a reasonable doubt. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). Thus, while defendant did not dispute that Parnell suffered three gunshot wounds to the head, the prosecutor was still required to prove all the elements of first-degree or second-degree murder, including intent. The autopsy pictures, which showed the nature and extent of the injuries suffered by Parnell, were relevant to establish defendant's intent. *Mills*, 450 Mich at 71 (“[I]t has been held that evidence of injury is admissible to show intent to kill.”).

Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by unfair prejudice. MRE 403. Gruesomeness alone, however, does not require exclusion. *People v Gayheart*, 285 Mich App 202, 228; 776 NW2d 330 (2009). Further, we note that the photos at issue are not extremely gruesome. Only one of the autopsy photos actually shows Parnell's face, which is partially wrapped by a bloody bandage. No wounds are visible in that photo and it is not immediately clear to the viewer that the subject of the photo is deceased. The two photos that do depict the fatal wounds are close-up photos that do not show Parnell's face or any large portion of her body. The final two photos from the autopsy merely show the bullet fragments that were recovered. The fragments appear to be sitting on a table; no part of Parnell's body is depicted. Here, where the autopsy pictures were relevant to the nature and extent of Parnell's injuries, the probative value of the pictures was not substantially outweighed by a possibility of unfair prejudice. Accordingly, the trial court did not abuse its discretion in admitting the “grizzly” autopsy pictures.

Defendant next argues that the trial court erred in failing to instruct the jury on voluntary and involuntary manslaughter. Because defendant never requested that the jury be instructed on manslaughter, defendant's claim of instructional error is unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). We review this unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

A defendant is entitled to an instruction on “a necessarily lesser included offense . . . if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Voluntary and involuntary manslaughter are necessarily lesser included offenses of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Thus, when a defendant is charged with murder, instructions on voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. *Id.*

Manslaughter is murder without malice. *Id.* at 534. “Voluntary manslaughter requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions.” *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009). Involuntary manslaughter is an “unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the

negligent omission to perform a legal duty.” *Mendoza*, 468 Mich at 527. Here, there was no evidence presented that suggested defendant killed Parnell in the heat of passion or that he unintentionally killed Parnell. Moreover, the defense theory was that persons other than defendant shot Parnell. Defendant argued these persons were Frederick and Kenneth Wallace. Under these circumstances, a rational view of the evidence did not support instructions for voluntary and involuntary manslaughter. See *id.* at 547 (holding that a rational view of the evidence did not support an instruction on involuntary manslaughter when the defendant claimed that someone else committed the murder). Accordingly, the trial court did not plainly err in failing to instruct the jury on voluntary and involuntary manslaughter.

Finally, defendant argues that his convictions are against the great weight of the evidence. Because defendant did not make this claim in a motion for a new trial, the issue is unpreserved. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). We review this unpreserved claim for plain error affecting defendant’s substantial rights. *Id.*

A verdict is against the great weight of the evidence when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). A verdict may be vacated only when it is not reasonably supported by the evidence and the verdict was more likely the result of causes outside the record, such as passion, prejudice, or sympathy. *Id.* The resolution of witness credibility is within the exclusive province of the jury. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

Defendant’s convictions are reasonably supported by the evidence. There was evidence that defendant was with Parnell in the early morning hours of November 7, 2009. Cynthia Hadden, Parnell’s aunt, testified that while she was talking on the telephone in her bedroom sometime after 2:00 a.m., she heard Parnell tell “Tutu,” which was defendant’s nickname, to stop it and to stop touching her. Between 2:00 a.m. and 4:00 a.m., a male and female were seen outside the house where the Outriders Motorcycle Club socialized, and the detachable hood to Parnell’s coat was found near the house. In addition, defendant’s own statements indicated that he shot Parnell. Wallace, defendant’s cousin, testified that when defendant called on the telephone soon after 4:00 a.m. on November 7, 2009, defendant said that he shot someone. Frederick, Wallace’s brother, testified that defendant, after he arrived at Frederick’s apartment later that day, said that he shot someone. Mitchell Pierce testified that, while in a jail holding cell with defendant and other inmates, he overheard defendant say that he shot a girl. Further, Frederick testified that defendant wore a black hooded sweatshirt on November 7, 2009. A black hooded sweatshirt was found on top of garbage bags in a dumpster outside Frederick’s apartment. DNA extracted from a blood stain on the sweatshirt matched Parnell’s DNA. Based on this evidence, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lacalamita*, 286 Mich App at 469. Accordingly, defendant’s convictions are not against the great weight of the evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens