

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON WAYNE CHAPMAN,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 265064

Montcalm Circuit Court

LC No. 04-001213-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JOSEPH CHAPMAN,

Defendant-Appellant.

No. 266736

Montcalm Circuit Court

LC No. 04-001214-FC

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

In these consolidated appeals, defendant Aaron Chapman was convicted of first-degree open murder, MCL 750.316(1)(a) and (b), and unlawfully driving away an automobile, MCL 750.413. Defendant Anthony Chapman was convicted of first-degree felony murder, MCL 750.316(1)(b), and unlawfully driving away an automobile, MCL 750.413. Defendants were both sentenced to life in prison without parole for their first-degree murder convictions and three to five years' imprisonment for their unlawfully driving away an automobile convictions. Defendants appeal as of right. We affirm.

I. Background

On Thursday, April 26, 2001, around 9:30 p.m., Katherine Dyer (the victim) left a church meeting with a Bible and songbook in hand. The very next morning, around 8:30 a.m., the

victim's son, Ken Dyer, went to the victim's house and discovered her body lying in the hallway with a Bible nearby.¹ Ken noted that the victim's car was missing. Early in the morning on April 27, 2001, Aaron, Anthony, Travis Underwood and Rodney Cobb showed up at Kyle Chapman's² house in the victim's car. In the early afternoon Kyle followed the car to Vestaburg Road, waited for the others to burn the car, and then dropped everyone off at various places.

After interviewing various individuals, the police learned that Travis, Aaron and Anthony all made multiple incriminating statements to others, not only involving the stealing and subsequent burning of the victim's car, but also the circumstances surrounding the victim's death. Various witnesses testified that they heard Travis, Aaron and Anthony say that they went to the victim's house to steal OxyContin because they had overheard that the victim had a prescription for them.

Various witnesses established that Anthony further stated that the victim came home from church while he was in her house, which eventually led to Travis striking the victim in the head with a pipe wrench, and the subsequent stealing and burning of the victim's car. Furthermore, after being kicked out of his ex-girlfriend's house, Anthony told her "I'll beat you bitch, just like we did that old lady," and at one point or another, Anthony specifically told groups of people that "they had beat the old lady with a pipe," and "the bitch died with a Bible in her hand." The only time Anthony mentioned Aaron in his various statements, was when he told his friend Kim Lumbert that Aaron was supposed to meet "them" at the victim's house. However, various witnesses established that Aaron stated that when things went wrong at the victim's house, he killed the victim by smashing her in the head,³ and subsequently stole and burned her car. Furthermore, others heard Aaron specifically say "oh yeah, I killed that old lady," and "I'm the one who killed the old bitch, whatever," on separate occasions. The only time Aaron mentioned Anthony in his various statements was when he told Brandon Devers that Anthony was in the victim's garage acting as a lookout. Defendants both presented an alibi defense.

II. Analysis

On appeal, defendants both argue that the trial court violated their respective Confrontation Clause rights when it allowed Travis' and their respective hearsay statements to be admitted as substantive evidence against each other. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).⁴

¹ Dr. Stephen Cole, who was stipulated as an expert in forensic pathology, testified that the victim was strangled and hit in the head several times with a blunt object, causing her death.

² Kyle was granted immunity from his involvement in exchange for testifying.

³ We note that Aaron told fellow inmate Brandon Devers that he merely restrained the victim while Travis struck her in the head.

⁴ An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. An abuse of discretion standard "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial

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When the decision involves a preliminary question of law, such as whether a rule of evidence, statute, or constitutional provision precludes the admission of evidence, a de novo standard of review is used. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Even if erroneous, the admission of evidence is harmless if it did not prejudice the defendant. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998).⁵

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. MRE 801(C); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is generally not admissible as substantive evidence. MRE 802; *Tanner, supra* at 629. Here, Travis, Anthony and Aaron, none of whom testified at trial, gave the statements in question. The statements were being offered to prove the truth of the matter asserted. Thus, the statements are hearsay. *Tanner, supra* at 629.

When the prosecution elicited the questioned statements, the trial judge allowed the statements in under the statement against penal interest exception. Under MRE 804(b)(3):

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Taking each of the individual's statements as a whole, at the very least, each of the questioned statements put them at the murder scene, established that they broke into the victim's house to steal drugs, and subsequently stole and burned the victim's car. Each of the statements subjected the respective individual to criminal liability, and accordingly met the statement against penal interest hearsay exception. MRE 804(b)(3). The statements were also made at the initiative of the declarants, often in the context of conversations with friends or relatives, and therefore satisfied the reliability elements underpinning the rule of evidence. *People v Poole*, 444 Mich 151, 160-162; 506 NW2d 505 (1993).

The Sixth Amendment's Confrontation Clause bars the admission of "testimonial" statements of a witness who does not appear for trial, "unless the witness was unavailable to

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court selects one of these principled outcomes, "the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* A trial court's decision on a close evidentiary question does not amount to an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

⁵ Confrontation Clause violations are subject to harmless error analysis. *Cruz v New York*, 481 US 186, 193-194; 107 S Ct 1714; 95 L Ed 2d 162 (1987).

testify and the defendant had a prior opportunity to cross-examine the witness.” *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford* the Court concluded that non-spontaneous statements made under police interrogation, or statements made in affidavits or prior sworn testimony, all had the attributes of “testimony” for purposes of the Confrontation Clause. See *Crawford, supra* at 51-52. However, statements made by a co-conspirator, or offhand, casual remarks to an acquaintance do not bear the indicia of testimony. *Id.* In this case, the statements made by Travis, Aaron and Anthony were not made to the police, and were not in the form of sworn testimony. Instead, the statements were offhand remarks made to acquaintances or others who were neither working for, nor acting on behalf of, the police or other government authority. They were voluntarily made without any prompting. Consequently, the statements were non testimonial, and they were not subject to the Confrontation Clause. *Crawford, supra; Wharton v Bockting*, ___ US ___, ___; 127 SCt 1173; 167 LE2d 1 (2007).⁶

Given our holding that Anthony’s statements were properly admitted into evidence under the statement against penal interest exception, MRE 804(b)(3), and were not barred as substantive evidence against Aaron by the Confrontation Clause, *DeShazo, supra; Washington, supra* at 671-672; it logically follows that the trial court also did not err when it denied Aaron’s request to have the jury instructed that Anthony’s statements could not be used as substantive proof of Aaron’s guilt. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).

Defendants also argue that the trial court erred when it denied their respective motions for a court appointed investigator. We review a trial court’s denial of a defendant’s motion for a court appointed investigator for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001).

A court appointed investigator is not “‘automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case.’” *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984), quoting *Mason v Arizona*, 504 F2d 1345 (CA 9, 1974). The trial court has discretion to determine whether an indigent defendant has demonstrated that an investigator is necessary to ensure due process. *Johnson, supra* at 260. A defendant’s reasons cannot rest on “pure conjecture.” *Id.* Here, defendants failed to establish who the investigator would speak to and what helpful information those individuals could provide. Thus, defendants’ motions were both based on pure conjecture, and the trial court did

⁶ Moreover, Aaron told two witnesses that he killed the victim by smashing her in the head, and other witnesses heard Aaron say “I’m the one who killed the old bitch, whatever.” Devers testified that Aaron told him that he went to the victim’s house to steal OxyContin, and the victim walked in on “them” while “they” were in her house, so he had to restrain the victim while Travis struck her in the head. Additionally, various witnesses established that Anthony made numerous statements putting himself at the crime scene, breaking into the victim’s house to steal OxyContin, stealing and subsequently burning the victim’s car, and implying that he struck and killed the victim. Therefore, the admission of each of the individuals questioned statements did not prejudice either Aaron or Anthony, and any error in allowing the statements into evidence was harmless. *Cruz v New York*, 481 US 186, 193-194; 107 S Ct 1714; 95 L Ed 2d 162 (1987); *Bartlett, supra* at 158.

not abuse its discretion when it denied defendants' respective motions for a court appointed investigator. *Id.*

Defendants next argue that the trial court erred when it denied their respective motions to have a separate trial and/or separate juries. We review a trial court's decision on a motion to sever the trials of multiple defendants for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

A strong public policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993). Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. *Hana, supra* at 346-347.

In order to establish that his substantial rights will be affected absent the granting of separate trials, a defendant must establish that he and his co-defendant's defenses are inconsistent, mutually exclusive, and irreconcilable. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). When the defenses offered by codefendants are antagonistic, separate trials should be granted. *Harris, supra* at 152. A defense is antagonistic when it appears that a codefendant might testify to exculpate himself and to incriminate the other defendant. *Id.* at 153. However, a conclusory statement of antagonistic defenses is insufficient, and a confession is not antagonistic if it incriminates both defendants. *Id.* Dual juries may be used to avoid the problems created by a joint trial, the use of which is considered a partial severance of a trial and is to be evaluated by the same factors as a motion to sever trials. *Hana, supra* at 351-352.

At trial, defendants presented similar alibi defenses, and therefore their defenses were not inconsistent, mutually exclusive, and irreconcilable. Additionally, neither defendant testified, and neither defendants' respective out of court statements incriminated their co-defendant without additionally incriminating themselves. Defendants' defenses were therefore not antagonistic. *Harris, supra* at 153. Since defendants failed to establish that their substantial rights were prejudiced by the trial court's failure to sever their trial and/or grant them separate juries, the trial court did not abuse its discretion when it denied their respective motions. *Hana, supra* at 346-347, 351-352.

Aaron individually argues that he was denied his right to the effective assistance of counsel when his trial counsel failed to move to suppress Devers' testimony that was obtained in violation of Aaron's Sixth Amendment right to counsel. When reviewing a claim of ineffective assistance of counsel without the benefit of a *Ginther*⁷ hearing, our review is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A defendant's right to counsel is violated where the government deliberately creates a situation likely to induce a defendant to make incriminating statements without the presence of his attorney. *Maine v Moulton*, 474 US 159, 180; 106 S Ct 477; 88 L Ed 2d 481 (1985). However, "a defendant does not make out a violation of [his right to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlman v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986).

Here, Devers, who spent time in jail with Aaron and Anthony, testified to statements that Aaron and Anthony made to him. Devers stated that he initiated some of his conversations with Aaron. Furthermore, Devers admitted that once he had incriminating information he contacted the police to give them the information, and his motivation for doing so was to try to get a deal. Devers also stated that when he met with the police they tried to get him to agree to wear a wire. However, Devers did not receive anything for testifying, did not agree to wear a wire, and there is no evidence that Devers and the police worked out a plan designed to elicit incriminating remarks. Rather, it shows that Devers gathered information on his own and brought it to the police without being instructed or encouraged to do so. Therefore, Aaron's right to counsel was not violated. *Kuhlman, supra* at 459. Accordingly, a motion to suppress Devers' testimony would have been futile, and Aaron was not denied his constitutional right to the effective assistance of counsel. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).⁸

Anthony individually argues that there was insufficient evidence presented to support his felony murder conviction. We review sufficiency of the evidence claims de novo, viewing the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

⁸ Although Aaron's Standard 4 brief lists in the statement of questions the issue that there was insufficient evidence to support his felony murder conviction, the argument is found nowhere in his brief. A party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. Failure to brief a question on appeal "is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (malice), (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony murder statute. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). The intent to commit murder cannot be found solely from the intent to commit an underlying felony. *People v Aaron*, 409 Mich 672, 730; 299 NW2d 304 (1980). The facts and circumstances of a killing may give rise to an inference of malice. *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm; in addition, malice may be inferred from the use of a deadly weapon. *Carines*, *supra* at 759.

The jury convicted Anthony of felony murder based on the predicate felony of second-degree home invasion. MCL 750.316(1)(b). The elements of second-degree home invasion are (1) an illegal entry, and (2) either the intent to commit a felony, a larceny, or an assault at the time of the illegal entry, or the actual commission of a felony, a larceny, or an assault. MCL 750.110a(3).

At trial, Melinda Hulseley testified that Travis told her that Anthony overheard the victim getting a prescription for OxyContin, and that he, Aaron and Anthony subsequently went to the victim's house to steal the OxyContin, and were in the victim's house when she came home. Additionally, Devers testified that Aaron told him that he, Anthony and Travis went to the victim's house to steal OxyContin, while various other witnesses testified that they heard Anthony say that he went to the victim's house to steal OxyContin. Therefore, viewing the evidence presented in a light most favorable to the prosecution, sufficient evidence established that Anthony illegally entered the victim's home with the intent to commit larceny, which was sufficient to convict Anthony of second-degree home invasion. MCL 750.110a(3).

Additionally, Jamie Cox testified that she heard Anthony say "they had beat the old lady with a lead pipe," which resulted in Cox kicking Anthony out of her apartment, prompting Anthony to say "I'll beat you bitch, just like we did that old lady." Joey Wagoner testified that Anthony told him that he and Travis both started swinging when the victim returned home and surprised them. Lumbert testified that Anthony told her that they killed the victim because she scared them when she returned home. Ed Mitchell testified that Anthony told him that they hit the victim in the head with a rock and stuck a Bible on her body. Finally, Kyle testified that when Travis, Cobb, Aaron and Anthony came to his house and asked him to help dispose of the victim's stolen vehicle, Anthony had a wrench in his hand. Therefore, even though Anthony presented an alibi defense and numerous witnesses suggested that Anthony was merely present at the murder, the evidence viewed in proper context showed that Anthony struck the victim with either the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Carines*, *supra* at 759; *Flowers*, *supra* at 176. Accordingly, sufficient evidence was presented to support Anthony's felony-murder conviction as a principal offender. MCL 750.316(1)(b); MCL 750.110a(3); *Carines*, *supra* at 759.

Anthony next argues that the prosecutor denied him his right to a fair and impartial trial when he elicited testimony from Lumbert that Anthony had previously stolen a truck, and elicited testimony from Margaret Russo, Mitchell and Devers that they had been threatened. Anthony

failed to preserve this argument for appeal by objecting to the alleged prosecutorial improprieties on the same grounds that he asserts on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims of prosecutorial misconduct for a plain error which affected the defendant's substantial rights, with reversal occurring only if the plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We reject Anthony's claims that the prosecutor committed misconduct when he elicited testimony from Russo, Mitchell and Devers that they were threatened if they testified in this case. A defendant's threat against a witness is generally admissible to show a consciousness of guilt. *People v Scholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Furthermore, the prosecution can elicit testimony that a witness has been threatened by a defendant's family members or others if it is offered to show how the threats affected a witness's testimony, or explains a witness's prior inconsistent statement. *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983). Evidence may be admitted to assist in the evaluation of the credibility of a witness. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Id.* Given that the witnesses' testimony did not implicate defendant as the person who threatened them, we hold that the threats were not being offered to show a consciousness of guilt, but rather were being offered to show the threats effect on the witnesses' respective testimony and to strengthen the witnesses' credibility. Thus, contrary to Anthony's arguments, the prosecutor's act of eliciting the threat testimony did not deny defendant his right to a fair and impartial trial and did not amount to prosecutorial misconduct. *Mills, supra* at 72; *Watson, supra* at 586; *Clark, supra* at 412-413.

We likewise reject Anthony's assertion that the prosecutor committed misconduct when he elicited testimony from Lumbert that Anthony had previously stolen a truck. Immediately after eliciting testimony from Lumbert regarding statements and threats that Anthony had made to her, the prosecutor inquired if Anthony's statements led to their break-up and if Anthony's subsequent threats stemmed from the break-up.

Q When did – what caused your breakup?

A He stole a truck from Gold Star, come (sic) back and wanted me to go for a ride with him and we had argued about this situation here and I asked him to stay somewhere else.

Q You argued about this killing?

A Yeah. I asked him to stay somewhere else and he came back later that night and stole a truck and I called the cops.

Evidence of other crimes, wrongs or acts is not admissible to prove that a person acted in conformity with his general character. MRE 404; *People v Crawford*, 458 Mich 376, 383; 582

NW2d 785 (1998). However, even if this testimony amounted to improper character evidence, the record establishes that Lumbert volunteered the information, and defendant has not established that the prosecutor knew, encouraged, or conspired with Lumbert to provide the questioned testimony. Thus, Lumbert's testimony about Anthony stealing a truck did not deny defendant his right to a fair and impartial trial and is not attributable as misconduct to the prosecutor. See *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990) (holding that nonresponsive answers to a prosecutor's questions by a prosecution witness are not attributable as misconduct to the prosecutor unless the prosecutor knew, encouraged, or conspired with the witness to provide the unresponsive testimony).⁹

Anthony next argues that the trial court erred when it precluded him from adding Linda Jones as an alibi witness. We review a trial court's decision to allow the late endorsement of a witness for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998).

A trial court has discretion to exclude alibi testimony when the defendant violates the notice provisions of MCL 768.20 and MCL 768.21. *People v Travis*, 443 Mich 668, 678-680; 505 NW2d 563 (1993). The purpose of the alibi notice statute is to avoid unfair surprise by giving both parties the maximum possible amount of information to prepare their respective cases. *People v Travis*, 443 Mich 668, 675-676; 505 NW2d 563 (1993). In exercising its discretion to exclude an additional alibi witness, the trial court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case. *Id.* at 682.

During the fifth day of trial, Anthony requested that Jones be added as an alibi witness. The prosecution was informed of Anthony's intentions mere hours before the request was made, and consequently did not have any time to investigate the proposed witness. Thus, the prosecution was prejudiced by Anthony's failure to initially disclose his intent to call Jones. Furthermore, Anthony admittedly had the opportunity to discover Jones through due diligence over a week prior to his request, and did not provide a good reason for his late disclosure. Additionally, as noted by the trial court, the jury, which already heard four days of testimony, never had an opportunity to be voir dired regarding Jones. There also was other strong evidence admitted to establish Anthony's guilt. Finally, Anthony was not prejudiced because he was able to present numerous alibi witnesses, and his counsel stated, Jones' testimony "may be cumulative and may not mean anything." In light of this analysis, we hold that the trial court's decision to preclude Anthony from adding Jones as an alibi witness was a reasonable and

⁹ Moreover, as previously discussed, various witnesses testified that Anthony admitted that he was also actively involved in the circumstances leading up to the victim's death. Therefore, even if the prosecutor's challenged actions denied Anthony his right to a fair and impartial trial, the prosecutor's actions did not affect the outcome of the proceedings. Thus, reversal would not be required. *Thomas, supra* at 453-454.

principled outcome, and did not amount to an abuse of discretion. MCL 768.20; MCL 768.21; *Travis, supra* at 678-680, 682.

Anthony's final argument on appeal is that he is entitled to a new trial based on newly discovered impeachment evidence. Anthony failed to move for a new trial before the trial court, and has failed to properly preserve this issue for appeal.¹⁰ MCR 2.611; MCR 2.612; *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). We review unpreserved claims for plain error affecting substantial rights. *Carines, supra* at 763, 773.

A motion for a new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is such "as to" render a different result probable on retrial; and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Newly discovered evidence is not grounds for a new trial when it would merely be used for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Given that Anthony's only proposed use of the evidence would be to impeach Kyle's testimony, Anthony was not entitled to a new trial on the basis of the proposed evidence. Therefore, the trial court did not commit plain error affecting Anthony's substantial rights when it failed to sua sponte grant him a new trial. *Davis, supra* at 516.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray

¹⁰ We note that Aaron made a motion for a new trial, which was denied.