

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAUN TREMAL FERGUSON,

Defendant-Appellant.

UNPUBLISHED

March 19, 2013

No. 307666

Genesee Circuit Court

LC No. 09-024939-FC

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 45 to 70 years' imprisonment for the second-degree murder conviction, 5 to 15 years for the felon in possession of a firearm and carrying a concealed weapon convictions, and 10 years for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in denying him an opportunity to examine a confidential human source (CHS) who arranged the purchase of a firearm from a suspected gang member several months after the murder in this case. The firearm was later determined to be the murder weapon in this case. In particular, defendant contends that the trial court should have held a hearing in chambers to determine whether the CHS possessed information that could have helped the defense, that the trial court's decision denied defendant his constitutional right to present a defense, and that the prosecution failed to disclose exculpatory and material evidence by failing to identify or produce the CHS. We disagree.

This Court reviews de novo whether a defendant was denied the constitutional right to present a defense. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). This Court also reviews de novo a defendant's claim that he was denied due process by the prosecution's failure to disclose exculpatory and material evidence. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). A trial court's decision regarding whether to order the production of a confidential informant is reviewed for an abuse of discretion. *People v Poindexter*, 90 Mich App 599, 608; 282 NW2d 411 (1979). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Initially, we note that it is the *federal* government, rather than the state prosecution in this case, that has refused to disclose the identity of the CHS; indeed, the record contains no evidence that the prosecution in this case is even aware of the identity of the CHS. Defendant has failed to cite authority or to argue that a Michigan trial court possesses authority to order the federal government to identify or produce a CHS. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority.” *Schumacher*, 276 Mich App at 178 (internal quotation marks, brackets, and citation omitted). Accordingly, this issue has been abandoned. *Id.* In any event, we conclude that defendant’s argument lacks merit.

“[T]he Sixth Amendment guarantees defendants a meaningful opportunity to present a complete defense.” *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011) (internal quotation marks omitted), citing *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006). However, “[t]he right to present a defense is not absolute or unfettered.” *Orlewicz*, 293 Mich App at 101. A defendant is entitled to present witnesses only if those witnesses’ “testimony would be both material and favorable to the defense.” *Id.* at 101-102. Also, “[d]ue process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure.” *Schumacher*, 276 Mich App at 176, citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a *Brady* violation, a defendant must show

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Schumacher*, 276 Mich App at 177 (internal quotation marks and citation omitted).]

Further, “[t]here is no general constitutional right to discovery in a criminal case.” *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). “Generally, the people are not required to disclose the identity of confidential informants.” *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). However, if disclosure of the informant’s identity or the content of the informant’s communication is relevant and helpful to the defense, or is essential to a fair determination of the case, then the privilege does not apply. *Cadle*, 204 Mich App at 650, citing *Roviaro v United States*, 353 US 53, 60-61; 77 S Ct 623; 1 L Ed 2d 639 (1957). If the defendant demonstrates a possible need for the informant’s testimony, the trial court should order the production of the informant for a hearing in chambers, out of the defendant’s presence, to determine whether the informant could offer testimony helpful to the defense. *People v Underwood*, 447 Mich 695, 706; 526 NW2d 903 (1994). Whether disclosure is required depends on the particular circumstances of a case, taking into account “the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.” *Id.* at 705, quoting *Roviaro*, 353 US at 62.

Here, the trial court did not abuse its discretion in declining to hold an in-camera hearing. Defendant failed to demonstrate a possible need for the CHS's testimony. Defendant was on trial for a murder that occurred on January 30, 2009, at the victim's house in Mount Morris Township. The murder weapon was recovered several months later, in October 2009, in an undercover purchase by a CHS from a suspected gang member, Antonio Watson, as part of an FBI investigation into a Flint-area street gang known as the Dayton Mafia. Other than the fact that the firearm recovered months later in an FBI investigation was determined to have been the murder weapon in this case, the record discloses no connection whatsoever between the CHS and the crime in this case. In his investigation of the Dayton Mafia, FBI Agent Michael Wiggins found no connection to defendant or Jones or any reference to the murder scene, and Wiggins indicated that very little Dayton Mafia activity exists in the Mount Morris area. Likewise, Detective James Williams, the officer in charge in this case, had no information that the Dayton Mafia was involved in this case or that Jones or defendant was associated with the Dayton Mafia. Further, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Agent Alan Jakubowski explained that in his experience as an ATF officer, guns change hands rapidly in the criminal world after a crime is committed.

Accordingly, we can discern no basis to conclude that the CHS in the FBI's Dayton Mafia investigation could offer any testimony helpful to the defense, because the CHS has no connection to this case other than his purchase of the murder weapon from an alleged gang member several months after the murder occurred. The CHS was not involved in the investigation of the murder in this case, but rather was involved in a separate federal investigation of a gang with which neither defendant nor Jones were associated. Therefore, because defendant has failed to demonstrate a possible need for the CHS's testimony, the trial court's declination to hold an in-camera hearing fell within the range of principled outcomes.

Further, because defendant has not shown that the CHS's testimony would be material and favorable to the defense, defendant has not established that the court's refusal to require the CHS's production constituted a denial of defendant's right to present a defense. *Orlewicz*, 293 Mich App at 101-102. Likewise, given that no basis exists to conclude that the CHS could offer testimony helpful to defendant, defendant has not established a *Brady* violation. The state did not possess or suppress evidence favorable to the defense. *Schumacher*, 276 Mich App at 177. And as discussed, it is the federal government, rather than the state prosecution, that has refused to identify the CHS.

Defendant next argues that the prosecutor committed misconduct by deliberately misstating evidence in her rebuttal closing argument. We disagree. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Here, defendant did not contemporaneously object and request a curative instruction with respect to the portion of the prosecutor's rebuttal closing argument challenged on appeal. Accordingly, as defendant concedes on appeal, this issue is not preserved for appellate review.

Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. Further, allegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context.

Unpreserved issues are reviewed for plain error affecting substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Further, this Court cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [*Id.* at 475-476 (internal quotation marks, brackets, and citations omitted).]

“When considering a claim of prosecutorial misconduct, the prosecutor’s statements should be considered in context, which includes defense counsel’s arguments.” *People v Cain*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301492, issued December 20, 2012) (slip op at 3). “A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003); see also *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995) (“Prosecutors are permitted to argue the evidence and make reasonable inferences in order to support their case theory.”).

Here, defendant challenges the prosecutor’s following statement in rebuttal closing argument: “When you’re the officer in charge and when you get arrested, your fingerprints get taken. Had those prints matched any of those prints at the house there would have been what they called an AFIS [Automated Fingerprint Identification System] hit that he [Detective Williams, the officer in charge] described for you. There wasn’t.” Defendant notes that this statement followed the prosecutor’s observation that Watson was arrested. According to defendant, there was no evidence that an AFIS check was done on the unidentified fingerprints lifted from Jones’s house or that an AFIS check was performed after Watson was arrested. Thus, defendant contends, the prosecutor deliberately misstated evidence to eliminate Watson as a suspect in Jones’s murder.

Initially, we note that the challenged portion of the prosecutor’s rebuttal closing argument was responsive to defense counsel’s effort in closing argument to shift the focus to Watson. “A prosecutor’s remarks must be considered in light of defense arguments.” *Ackerman*, 257 Mich App at 453-454 (internal quotation marks and citation omitted). Here, defense counsel asserted in closing that Watson had the murder weapon, that “[w]e don’t know where [Watson] was that night[,]” that Watson was a gang member and a drug dealer, and that the prosecution did not “present any information about the fellow who had the actual murder weapon.” Defense counsel also challenged the quality of the investigation into the murder, asserting “that leads weren’t looked into” and that “[t]he whole investigation” was “completely incomplete.” Later, defense counsel stated:

We don’t know at this point if Antonio Watson didn’t have the gun on that night. We don’t know. How would you know? How can you convince [sic] somebody else when the guy with the murder weapon, we don’t know his whereabouts at the time? And they said, well, we don’t have any evidence that he was there. That’s their job. Not my job. It’s their job.

Then, after again noting that Watson was a gang member, defense counsel said, “I don’t know, I don’t know if [Watson] did it. It’s not my job to prove it.”

It is clear that the prosecutor was responding to the above defense argument when the prosecutor noted that Watson had been arrested, that if Watson's fingerprints had matched any prints recovered from Jones's house there would have been "an AFIS hit," and that no such "AFIS hit" occurred. "Again, a prosecutor's statements should be viewed in the context of the defendant's arguments." *Cain*, ___ Mich App at ___ (slip op at 3).

Moreover, the prosecutor's argument was supported by facts in evidence. On cross-examination by defense counsel, Detective Williams testified as follows:

Q. Okay, so when you heard — and there were multitudes of fingerprint people that came in. You heard them say there was [sic] a number of fingerprints that were not identified that were found in the home of the deceased. You heard that.

A. Correct.

Q. Okay. Tell the jury what you did to match those unidentified fingerprints up with the gentleman Mr. Watson who was found in possession of the murder weapon.

A. As far as I know Mr. Watson's fingerprints are on record. They would have matched, but they didn't with the identified [sic].

Q. Did you go back and check yourself?

A. No. They're in AFIS. He's convicted —

Q. I understand that.

A. — of a felony. They would've matched.

Q. Okay, I understand that, but I don't see any report from you that you did that.

A. Well, I wouldn't do that. I would automatically be notified that there was a match. There was no match. When they came back unidentified, that means they did not match his.

Q. So, what you're saying is that Mr. Watson had a criminal record.

A. I would say so.

Q. No. You just said it. What was his criminal record?

A. Yes. Well, when he was fingerprinted at one point or another when he was taken into custody that would have come [sic] back that they matched those prints.

Q. What's his criminal record?

A. I never received any information, therefore —

Q. What's his criminal record?

A. I don't know his criminal record right now, but I'm saying when he was taken into custody, he would have been fingerprinted. Those fingerprints would have come [sic] back as a match. I would have been notified that there was a match on those unidentified fingerprints.

Q. So, the FBI told you that?

A. Because the unidentified fingerprints go into AFIS as unidentified. When a match comes up, I'm notified.

Q. Don't they have to be submitted, sir?

A. No. They're saved in AFIS.

Q. I understand that, sir, but don't they have to be submitted from your investigation? When did you submit? Because I'm sure I asked of all the people who have testified, they said they were testifying against known submitted samples. That's what every witness said. I want to know when you submitted Mr. Wiggins's, excuse me, Mr. Watson's fingerprints, if you did.

A. That's what I'm telling you, Mr. Manley. If fingerprints —

Q. That's what I want to know. You didn't. . . .

Later, on redirect examination, Detective Williams further explained this matter:

Q. Did you — you were trying to tell us about fingerprints and Antonio Watson. Can you clear that up for us? You were trying to say it would've popped up. So, what did you mean?

A. Yes. If the crime lab comes out and they have fingerprints or if we ourselves submit fingerprints, they — and they're unidentified, they go in the unidentified fingerprint database in AFIS. So, if someone comes up in the future, they get fingerprinted. It comes up flagged as a hit and we're notified. That's how when like [sic] say someone hasn't been arrested yet, they do a home invasion or something to get their prints, well, the prints are on record. They're taken and then put into this unsolved database. They get arrested three or four years later, they get fingerprinted, it comes up, we're notified. There's a hit on that unidentified print. That's how that works.

Q. And prints are taken at arrests and not conviction, right?

A. Correct.

We conclude that Detective Williams's testimony supported the challenged portion of the prosecutor's rebuttal closing argument. Williams testified that unidentified fingerprints are entered into AFIS, and that when a person is arrested, the person's fingerprints are taken. The fingerprints are then entered into AFIS, and if a match occurs with unidentified fingerprints, the police are notified. Williams received no notification of a match with Watson's fingerprints. Moreover, FBI Agent Wiggins testified that Watson is under federal indictment, which supports a reasonable inference that Watson had been arrested and fingerprinted. The prosecutor's closing argument was thus supported by evidence or reasonable inferences from the evidence.

In any event, to the extent that the challenged portion of the prosecutor's argument was not adequately supported by the evidence or reasonable inferences from the evidence, reversal is not required because any prejudice could have been alleviated by a timely curative instruction. *Bennett*, 290 Mich App at 476; *People v Ullah*, 216 Mich App 669, 682; 550 NW2d 568 (1996). Indeed, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence," that it is the jury's job to decide what the facts of the case are, and that the jury must decide the case based on the evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, even if the prosecutor's comments were not sufficiently grounded in the evidence, any prejudice was cured. See *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011) (holding that the prosecutor's reference to facts that were absent from the record did not require reversal "because the trial court clearly instructed the jury that the lawyers' statements and arguments are not evidence.") (internal quotation marks, brackets, and citation omitted); *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010) ("Moreover, to the extent that the prosecutor may have stepped into argument beyond what the evidence properly allowed, the trial court's instructions that the jury decide the case solely on the basis of the evidence and that the statements of counsel were not evidence should have cured any prejudice."); *Ullah*, 216 Mich App at 682-683 ("We are also satisfied that the court's instruction to the jury that the arguments of counsel were not evidence dispelled any potential prejudice with respect to all the alleged instances of prosecutorial misconduct.").

Next, defendant contends that the prosecutor committed misconduct by directly asking Detective Williams who killed the victim and by referring to his answer in closing argument. We agree that the prosecutor committed misconduct with respect to certain questions, but we conclude that any prejudice could have been alleviated by a curative instruction, and the trial court in fact dispelled any prejudice by instructing the jury that it alone was to decide what the facts of the case were. Although defendant objected to the questions below, he did not request a curative instruction and did not object to the challenged portion of the closing argument. Accordingly, because this issue is not preserved, our review is again limited to plain error affecting substantial rights. *Bennett*, 290 Mich App at 475-476.

This Court has held "that a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense." *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985); see also *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). However, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704.

Here, the challenged questioning arose during the prosecution's redirect examination of Detective Williams, in response to an exchange on cross-examination. During defense counsel's

cross-examination of Detective Williams, the trial court sustained the prosecutor's objection, based on speculation, to a question suggesting Jones might have been killed by someone to whom he owed money for drugs. Defense counsel then asked Detective Williams whether it would be speculation to conclude that other witnesses in the case had committed the murder:

Q. So, would it be — if that's speculation, would it be speculation as well that Mr. Ferguson did this, Mr. [Byron] Tapo did this, Mr. [Phillip] Martin did this, the confidential human source did this, the guy with the weapon [i.e., Watson] did? We can speculate on all of them out there.

A. Are you asking me or are you telling me?

Q. You can speculate, correct?

A. I guess so. I don't know.

Then, on the prosecutor's redirect examination of Detective Williams, the following exchange occurred:

Q. When you were asked [on cross-examination] if you were speculating about Antonio Watson, and Tapo, and Martin, are you speculating that this defendant killed James Jones?

A. I don't believe I am.

Q. Who killed James Jones?

MR. MANLEY [defense counsel]: Judge, again I'm going to object. It's outside the purview and, in fact, it's mischaracterization of the evidence because indeed if you want to play it back, the detective said he would be able to agree that he was speculating. I named five people. So, that's mischaracterization. The question's improper.

THE COURT: Ms. Hanson?

MS. HANSON [the prosecutor]: I didn't ask if he was speculating on the defendant. I asked him when he said he was speculating on the other people. I then asked are you speculating on this defendant. He said no.

MR. MANLEY: The first count. The jury heard it, Your Honor, him talking about —

THE COURT: All right.

MR. MANLEY: Mischaracterized the evidence.

THE COURT: That's why we're having the trial. So I'll sustain the objection.

BY MS. HANSON:

Q. Who killed James Jones?

A. Shaun Ferguson killed James Jones.

MR. MANLEY: Speculation again, Your Honor.

THE COURT: That's the question that the jury's here to answer. So, I'll sustain the objection.

BY MS. HANSON:

Q. Where did your investigation lead?

MR. MANLEY: Asked and answered.

BY MS. HANSON:

Q. To the murder of James Jones.

THE COURT: I'll allow it.

BY MS. HANSON:

A. Shaun Ferguson.

MS. HANSON: I have nothing further, Your Honor. Thank you.

During her closing argument, the prosecutor stated:

[Detective Williams] said he did follow the leads. They always led him back to Shaun Ferguson. The phone and the hat at Lacy's house connected to Shaun Ferguson. . . . Only one set of prints from the victim's vehicle. Antonio Watson never came up until the gun buy, and the Dayton Mafia never came up in the investigation at all. He [i.e., Detective Williams] had no doubt that Shaun Ferguson killed James Jones.

As the above excerpts reveal, the challenged portion of the prosecutor's redirect examination of Detective Williams occurred in response to defense counsel's injection on cross-examination of speculative theories regarding whether various persons may have been involved in Jones's murder. Nonetheless, it was improper for the prosecutor to directly ask Williams who killed Jones, as "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense." *Bragdon*, 142 Mich App at 199. This error does not, however, require reversal because any prejudice could have been alleviated by a curative instruction. *Bennett*, 290 Mich App at 476; *Ullah*, 216 Mich App at 682. Moreover, although Williams answered the question before defense counsel objected, the trial court then sustained the objection, and stated, "That's the question that the jury's here to answer." Thus, the court made clear to the jury that

the question was improper and that the jury itself, rather than Williams, was to decide whether defendant killed Jones. The court reinforced this basic point in its final instructions:

As jurors, you must decide what the facts of this case are. That is your job and nobody else's. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses has said. What you decide about any fact in this case is final.

The court also instructed the jury that defendant was presumed innocent and that the prosecution had the burden to prove each element of the crimes beyond a reasonable doubt. The court further instructed:

As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of a person's testimony.

The court further instructed the jurors that the testimony of police officers "is to be judged by the same standards that you use to evaluate the testimony of other witnesses." In short, the court's instructions made clear that it was up to the jury to decide the facts of the case, thereby dispelling any prejudice arising from the improper questioning of Williams.

Further, the trial court properly allowed the prosecutor's follow-up question asking where Williams's investigation led, to which Williams answered that it led to defendant. As discussed, a witness may testify in the form of an otherwise admissible opinion or inference even though it embraces an ultimate issue to be decided by the trier of fact. MRE 704. As the officer in charge, Williams oversaw the investigation in this case. He could thus express an opinion or inference based on his own perceptions regarding where the investigation led. See MRE 701; *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). The evidence admitted at trial supported a reasonable inference that the investigation led to defendant, consistent with Williams's testimony. Defendant was the last person seen with Jones shortly before the murder, a cell phone connected to defendant and an orange hat containing his DNA were found at Sophia Lacy's house to which police officers tracked the fleeing suspect, a cell phone site analysis placed the phone connected to defendant in the area of the murder during the relevant time period, and Sophia Lacy testified that defendant came to her house in a frantic state, had her drive him away from the area of the murder while he leaned back in his seat, and told her not to tell anyone she had seen him. During the investigation, Williams personally observed various items, including the tire tracks in the snow coming from the driveway of Jones's house, the absence of footprints in the fresh snow in the yard at Jones's house, the fleeing suspect's footprints leading from a vehicle that had crashed into a snow bank, the draft text message on the cell phone connected to defendant saying "I had blood all on m[,]," and a chair with the word "Beecher" on it and the wood floor in Jones's house that matched the photographs in the cell phone connected to defendant depicting a weapon on a Beecher chair on a wood floor. Thus, Williams could express an inference or opinion rationally based on his own perceptions as the officer in charge regarding where his investigation led. Viewed in context, the prosecutor's question regarding the investigation was appropriate in light of the speculative theories injected by defense counsel on cross-examination.

Likewise, the prosecutor did not commit misconduct by stating in closing argument that Williams's investigation led to defendant, as the prosecutor was accurately describing the testimony in this case. To the extent that the prosecutor went beyond the permissible bounds of closing argument by asserting that Williams "had no doubt" that defendant killed Jones, any prejudice was dispelled by the trial court's instruction that "[t]he lawyers' statements and arguments are not evidence," that it is the jury's job to decide what the facts of the case are, and that the jury must decide the case based on the evidence; the jurors are presumed to have followed the court's instructions. *Graves*, 458 Mich at 486; *Meissner*, 294 Mich App at 457; *Parker*, 288 Mich App at 512.

Defendant next argues that the trial court erred in denying his motion to suppress the draft text message stating, "I had blood all on m[.]" on the cell phone connected to defendant, because the prosecutor failed to disclose that Detective Williams had inadvertently deleted a character on the draft. Defendant contends that this failure to disclose evidence denied him due process and violated a discovery court rule. We disagree.

This Court reviews de novo a defendant's claim that he was denied due process by the failure to disclose evidence. *Schumacher*, 276 Mich App at 176. "A trial court's decision regarding discovery is reviewed for [an] abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *People v Jackson*, 292 Mich App 583, 592; 808 NW2d 541 (2011).

As discussed, "[t]here is no general constitutional right to discovery in a criminal case." *Elston*, 462 Mich at 765. Nonetheless, "[d]ue process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *Schumacher*, 276 Mich App at 176. Due process does not, however, require the prosecutor to seek and find exculpatory evidence. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). To establish a due process violation arising from the failure to disclose information, a defendant must show

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Schumacher*, 276 Mich App at 177 (internal quotation marks and citation omitted).]

"A reasonable probability is a probability sufficient to undermine confidence in the outcome. Accordingly, undisclosed evidence will be deemed material only if it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998) (internal quotation marks and citations omitted).

In addition, MCR 6.201(B)(1) requires the prosecution to provide, on request, any exculpatory information or evidence known to the prosecutor.¹ If a party fails to comply with the discovery rule, the court has discretion to fashion an appropriate remedy, including an order prohibiting the introduction into evidence of the withheld material. MCR 6.201(J); *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 453; 722 NW2d 254 (2006).

Here, the prosecution did not fail to disclose any material, exculpatory information or evidence. Defendant does not claim that the prosecution failed to disclose the existence of the draft text message. Indeed, defense counsel conceded below that she learned of the draft text message “when we originally got discovery.” Further, defense counsel was afforded an opportunity to examine the cell phone and in fact reviewed the draft text message on the cell phone. Thus, the prosecution did not fail to disclose the existence of the cell phone itself or the draft text message on the cell phone.

Defendant asserts, however, that the prosecution “waited years, until days before trial” to disclose that Detective Williams had inadvertently deleted a character on the draft text message. In truth, Williams testified at trial that he did not realize that the alteration had occurred until after defense counsel examined the phone near the beginning of trial. Williams did not realize until around the beginning of trial that this alteration had occurred and that the alteration created a new draft above the one that said “I had blood all on m[.]” The defense attorneys came to look at the phone, and at that point the draft text message had been bumped down in the list. Williams and a defense attorney recreated what had happened, and then the draft in question was bumped down again, so that it was now the third draft down. Williams further explained:

. . . It actually wasn't here until trial that I'd looked after everybody had gone through the phone that I seen [sic] the characters were erased, deleted from the end. Now the M and the N have been deleted off there. I have no idea when that happened. Everybody has looked at this phone. It's been gone through. I have no idea. I noticed it while we were in trial.

When asked why he did not prepare a supplemental report regarding the deleted characters, Williams testified:

I didn't notice that until we were here in trial going through the phone with [defense] counsel. That's when I seen [sic] that. I'm not updating supplements to my report as the trial goes on. It's more something as I go back. When the trial concludes, I go back and update it. It's not something that I would actively be doing during the trial.

Despite the above testimony, the prosecution's response to defendant's motion to suppress the draft text message could arguably be read to suggest that Williams realized earlier that he had deleted a character in the draft text message; in particular, after describing how Williams had inadvertently deleted a character, the prosecution stated: “When [Williams]

¹ Defendant submitted such a request in this case.

realized what had happened, he shut the phone, but the phone saved the altered message as a new draft.” In addition, at the motion hearing on this matter two days before trial, the prosecutor stated that Williams told her that after one of the letters was deleted, “I didn’t know what to do. I closed the phone and it saved it as a new draft.” However, despite these assertions by the prosecutor, the only evidence in the record on this point is Williams’s subsequent trial testimony summarized above, explaining that he did not realize the alteration had occurred until around the beginning of trial. The record does not reveal precisely when the deletion occurred or when defense counsel examined the phone and subsequent deletions were made when recreating what had occurred.

Nonetheless, even assuming that Williams was aware at some earlier point that he had deleted a character in the draft text message and failed to disclose that fact until later, defendant has still failed to establish a due process violation. Defendant has not shown that if the deletion had been disclosed earlier, a reasonable probability exists that the outcome of the proceedings would have been different. Although defendant contends that he might have obtained an expert to determine what character Williams deleted, defendant has failed to show how such an expert would have “put the whole case in such a different light as to undermine confidence in the verdict.” *Lester*, 232 Mich App at 282 (internal quotation marks and citation omitted). In particular, it is not clear how an expert’s analysis of a missing character on a draft text message stating, “I had blood all on m[.],” on a cell phone connected to defendant, could generate evidence that undermines confidence in the verdict. Further, as discussed, the defense was aware of the existence of the draft text message from the time of the prosecutor’s response to the initial discovery request, and the defense could have obtained or requested an expert at any time to analyze the cell phone.

The record thus reflects that the prosecution did not fail to disclose material, exculpatory evidence. Therefore, defendant has failed to establish that he was denied due process or that the prosecution violated the discovery rule. Because no discovery violation occurred, the trial court did not abuse its discretion in refusing to suppress the draft text message.

We further note that, although defendant does not frame the constitutional issue in precisely this manner, his appellate argument could be read to suggest that the prosecution failed to *preserve* evidence, i.e., the full draft text message, because a character in the draft text message was deleted. “A criminal defendant can demonstrate that the prosecution violated his or her due process rights under the Fourteenth Amendment if the prosecution, in bad faith, failed to preserve material evidence that might have exonerated the defendant.” *People v Heft*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307150, issued December 20, 2012). “If the defendant cannot show bad faith or that the evidence was potentially exculpatory, the prosecution’s failure to preserve evidence did not deny the defendant due process.” *Id.* Here, defendant has not shown that the prosecution acted in bad faith; as discussed, the record reflects that the deletion was inadvertent. Defendant has also failed to demonstrate how the deleted character on the draft text message might have exonerated him. Accordingly, defendant cannot establish a due process violation on the basis of the failure to preserve evidence.

Defendant’s final argument on appeal is that the admission into evidence of records from the cell phone provider, AT&T, violated his right of confrontation because an AT&T representative was not made available for cross-examination. We disagree. Whether the admission of evidence violates a defendant’s Sixth Amendment right of confrontation presents a

question of constitutional law that this Court reviews de novo. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012).

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to confront the witnesses against him. US Const, Am VI. See also Const 1963, art 1, § 20 (adopting the language of the federal Confrontation Clause). “[T]he Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.” *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In general, a “statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Dendel*, 289 Mich App at 453, citing *Crawford*, 541 US at 51-52. In *Crawford*, 541 US at 56, the United States Supreme Court stated that business records “by their nature” are not testimonial. In *Melendez-Diaz v Massachusetts*, 557 US 305, 324; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the Supreme Court further explained: “Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” However, a Confrontation Clause issue may arise “if the regularly conducted business activity is the production of evidence for use at trial.” *Id.* at 321.

In *Nunley*, 491 Mich at 689, our Supreme Court held that a Michigan Department of State (DOS) certificate of mailing, notifying the defendant that his driver’s license had been revoked, “is not testimonial because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” The Court explained that the certificate “is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason.” *Id.* at 706. “The certificate here is a routine, objective cataloging of an unambiguous factual matter, documenting that the DOS has undertaken its statutorily authorized bureaucratic responsibilities. Thus, the certificate is created for an administrative business reason and kept in the regular course of the DOS’s operations in a way that is properly within the bureaucratic purview of a governmental agency.” *Id.* at 707. The Court further explained that “the certificates of mailing may be comfortably classified as business records ‘created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial[.]’” *Id.* at 710 (brackets in original), quoting *Melendez-Diaz*, 557 US at 324.

Neither the United States Supreme Court nor Michigan appellate courts have addressed specifically whether a cell phone provider’s records are testimonial. However, in *United States v Yeley-Davis*, 632 F3d 673, 679 (CA 10, 2011)², the court held that a cell phone provider’s

² Lower federal court decisions and decisions of other states’ courts are not binding on this Court but may be considered persuasive. *Jackson*, 292 Mich App at 595 n 3.

business records were not testimonial, noting that the provider had authenticated the phone records and had stated the records were kept in the course of the provider's regularly conducted business. Nor was the cell phone provider's certification of the records' authenticity testimonial in nature. *Id.* at 680. See also *State v Hood (On Reconsideration)*, ___ NE2d ___; 2012 WL 6757969, p 2 (holding that cell phone records produced by a cell phone company, if properly authenticated, ordinarily constitute business records that are not testimonial, but further holding that the records in that case were not properly authenticated and that their admission thus violated the defendant's right of confrontation).

Here, the trial court admitted AT&T's records regarding the cell phone at issue, pursuant to MRE 803(6), the business record exception to the hearsay rule; the records were accompanied by a declaration of authenticity from AT&T.³ FBI Special Agent Dann Harris, an expert in cell phone site analysis, reviewed AT&T's records to determine which cell towers were used by the cell phone, and to thereby determine the area in which the cell phone was located, at the time of the murder in this case. "[T]he regularly conducted business activity of cell-phone companies is not the production of evidence for use at trial. The fact that records are used in a trial does not mean that the information contained in them was produced for that purpose." *Hood*, ___ NE2d at ___, 2012 WL 6757969, p 8. It is evident that AT&T's business records were created for the administration of its affairs as a cell phone provider and not for the purpose of establishing or proving a fact at trial. Further, the records in this case were properly authenticated, as it is undisputed that a declaration of authenticity accompanied the records. Accordingly, the records were not testimonial, and their admission without confrontation at trial did not violate the Sixth Amendment. *Melendez-Diaz*, 557 US at 324; *Nunley*, 491 Mich at 710; *Yeley-Davis*, 632 F3d at 679-680.⁴

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

³ On appeal, defendant does not challenge the admissibility of the records under MRE 803(6); his appellate argument is confined to the Confrontation Clause issue.

⁴ Defendant states that he wanted to cross-examine an AT&T representative regarding the possibility that calls from or to the cell phone may have been redirected to a tower that was not the closest available tower. However, the fact that defendant wished to cross-examine an AT&T representative regarding a particular subject does not establish that AT&T's records were testimonial. Moreover, defense counsel at trial had a full opportunity to cross-examine Agent Harris, the expert who offered an opinion based on the facts contained in the records; indeed, defense counsel did cross-examine Agent Harris regarding the possibility of a call being redirected.