STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 271844 Isabella Circuit Court
FREDERICK TED SPENCER, Defendant-Appellant.	LC No. 05-000059-FC

Before: Owens, PJ, and Bandstra and Davis, JJ.

PER CURIAM.

After a jury trial, defendant Frederick Ted Spencer was convicted of one count of arson (preparation to burn property), MCL 750.77(1)(d)(*i*), arising from the fire in his home on January 30, 2000, and one count of felony murder, MCL 750.316(b), arising from the death of Kathy Sytek in the fire. The trial court sentenced defendant to concurrent sentences of life imprisonment for the felony murder conviction and two to ten years' imprisonment for the arson conviction, with 524 days' credit for time served. He now appeals as of right. We affirm.

I. Facts

Defendant Fred Spencer owned an old farmhouse on Deerfield Road outside Shepherd, Michigan. In 1999, Kathy Sytek, who was unemployed and had been forced to move from her apartment, began living rent-free in defendant's home. Defendant and Kathy began a relationship soon thereafter, and defendant supported Kathy financially. Both defendant and Kathy were alcoholics. Although some witnesses claimed that Kathy and defendant had a good relationship, others testified that their relationship became volatile when they drank.

Around 8:45 p.m. on January 30, 2000, Tracy Carpenter was driving west on Deerfield Road when she noticed that defendant's house was on fire and called 911. Soon after she began talking to the dispatcher, defendant ran toward her, distraught, and told her that his "woman" was inside the burning house. A few minutes later, defendant ran back to the house and entered the front porch, collapsing just inside the door. Firefighters arriving at the scene soon thereafter rescued defendant. He was transported to Saginaw St. Mary's Hospital and admitted to the burn trauma intensive care unit. Defendant received severe burns to his face and arms, requiring skin grafts, and was hospitalized for two-and-a-half weeks.

Other firefighters at the scene eventually put out the fire. They discovered Kathy's body in the dining room, lying facedown in a fetal position in front of a couch. An autopsy revealed that she died from asphyxia caused by carbon monoxide poisoning as a result of the fire. Her blood alcohol concentration at the time of death was 0.30 grams of alcohol per 100 milliliters of blood. Greg Proudfoot, a detective sergeant and state fire marshal for the Fire Marshal Division of the Michigan State Police, investigated the cause and origin of the January 30 fire. He determined that defendant started separate fires in the basement and garage of the house, and that the fire that he started in the garage destroyed the house.

II. Sufficiency/Great Weight of the Evidence

Defendant argues that the prosecution presented insufficient evidence to support his convictions, and that his convictions are against the great weight of the evidence. We disagree. We review de novo a claim of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We review the trial court's decision to deny defendant's motion for a new trial on the ground that the verdict is against the great weight of the evidence for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

When reviewing a claim that the evidence presented was insufficient to support a conviction, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We are required to draw all reasonable inferences and to make credibility determinations in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). However, to establish that the evidence presented was sufficient to support defendant's conviction, "the prosecution need not negate every reasonable theory consistent with innocence." *Id.* "The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

A prosecutor need not present direct evidence linking a defendant to the crime in order to provide sufficient evidence to support a conviction; "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *Id.* Further, a fact-finder may infer a defendant's intent from all the facts and circumstances provided. *Id.* "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "[I]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To establish defendant's conviction for arson (preparation to burn property), MCL 750.77(1)(d)(*i*), the prosecution must present evidence indicating that defendant (1) used, arranged, placed, devised, or distributed an inflammable, combustible, or explosive material, liquid, or substance or any device (2) in or near a building or other property whose combined value exceeded $20,000 (3) with the intent to willfully and maliciously set fire to or burn the building. Direct eyewitness testimony is not necessary to establish these elements; arson is often proven through circumstantial evidence because it is rare to have eyewitnesses to the crime.

Nowack, *supra* at 403 n 2, quoting *People v Horowitz*, 37 Mich App 151, 154; 194 NW2d 375 (1971). Our Supreme Court explained:

> [T]here is rarely direct evidence of the actual lighting of a fire by an arsonist; rather, the evidence of arson is usually circumstantial. Such evidence is often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from an accidental cause. [*Nowack*, *supra* at 402-403, quoting *Fox v State*, 179 Ind App 267, 277; 384 NE2d 1159 (1979).]

The prosecution presented sufficient evidence to support defendant's conviction for arson (preparation to burn property), MCL 750.77(1)(d)(*i*). First, the evidence presented at trial indicates that defendant used flammable liquids and combustible materials to set two separate fires in his house. Proudfoot's expert testimony establishes that the fire that destroyed the house was intentionally set in the garage. Admittedly, Proudfoot could not explain exactly how the fire started, although he found no indication that the garage fire was accidental. However, Proudfoot noted that two doors of the car parked in the garage were open. Further, the door to the gasoline tank of the car was open, and Proudfoot found a small piece of wood propping open the interior flap of the gasoline tank. Essentially, Proudfoot indicated, the car doors were positioned in a manner that would make it easier for the combustible interior of the car to burn and the gasoline tank door and flap were propped open in a manner that would permit gasoline fumes to escape. This circumstantial evidence indicates that someone was trying to involve the car in the fire that started in the garage.[1] A reasonable juror could then infer that someone who wanted the garage (and house) to burn intentionally started the fire in the garage and prepared the car in a manner that would facilitate accelerating the fire with the combustible and flammable materials in the car.

The evidence at trial also establishes that defendant started another fire near the water heater in the basement. Proudfoot's testimony, supplemented by photographs and videotape of the house, indicates that one side of the water heater burned on January 30. The bubbled paint on the burned area of the water heater had not blistered when Proudfoot initially photographed the water heater on January 31, indicating that the burning on the water heater had only recently occurred. Proudfoot found a gasoline container on top of the water heater and a container of matches nearby.

Further, the evidence presented at trial supports Proudfoot's conclusion that three attempts were made to ignite the water heater. Proudfoot found two matches aligned in a zigzag pattern on the water heater, with the edge of one match resting under the gasoline container. He also found a foot-long wooden shim with a burned edge on top of the water heater and a folded-up piece of cardboard with a burned edge on the ground underneath the burned side of the water

[1] Defendant claimed that he did not normally keep the door to the gasoline tank open. It would also be reasonable to infer that someone would not park his car in his garage, yet leave both doors and the gasoline tank door open and prop open the interior flap of the gasoline tank with a piece of wood, unless he wanted to involve the car in a fire.

heater. Further, the burn pattern on the water heater was consistent with the burn pattern that typically develops if gasoline is poured down the side of a painted metal surface and then ignited. Proudfoot suspected that after defendant failed to start a fire by arranging and lighting matches in a manner that would burn a hole in the gasoline container and ignite the gasoline inside, he splashed gasoline on the side of the water heater and used the wooden shim and cardboard to ignite the gasoline. Proudfoot explained that gasoline is not particularly "sticky," so if gasoline were splashed on the water heater and then ignited, the paint on the water heater would only burn over the short period in which the fire consumed the gasoline.

Further, the evidence presented at trial indicates that defendant set the fires in the basement and garage. The parties do not dispute that defendant and Kathy were the only people at defendant's home on the night of January 30, and Proudfoot found no evidence indicating that someone broke into defendant's house that evening. Kathy was highly intoxicated that evening, but the parties do not argue or provide evidence indicating that she was responsible for setting either fire. Conversely, the prosecution presented evidence indicating that defendant received the burns to his face and arms when he ignited the gasoline on the water heater.[2] Both Proudfoot and Wilcox explained that the burns to defendant's face and arms were consistent with injuries that are typical of an individual who received a flash burn, and that the brief, intense flame that causes a flash burn was likely produced when he ignited the gasoline on the water heater.

The evidence presented at trial also establishes that in 1998, defendant insured his house for $65,000 and the personal property inside the house for $32,000. The parties do not dispute that defendant's house and property involved in the January 30 fire had a combined value in excess of $20,000.

Finally, a reasonable juror could infer from the evidence presented at trial that defendant willfully and maliciously set fire to his house. Again, it is improbable that a car would simply be parked in the garage with its doors open, the door to the gasoline tank open, and the gasoline tank flap propped open with a piece of wood. Instead, a reasonable juror could infer that defendant positioned the car in this manner with the intention of starting a fire in the garage and using the combustible materials in the car as a fuel source for the fire, and that defendant's three attempts to use gasoline to set fire to the water heater indicate that he willfully and maliciously intended to start that fire. Accordingly, the evidence that defendant made several attempts in at least two locations to start a fire in his home indicates that he willfully and maliciously set fire to his house on January 30.

The prosecution also presented sufficient evidence to support defendant's felony murder conviction.

> 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

[2] Although firefighters found defendant and rescued him from the front porch of his house that night, both their testimony and Proudfoot's investigation indicated that the front porch was not burning when defendant was rescued, so defendant would not have received his burns there.

> death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including (arson)]. [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

"The facts and circumstances of the killing may give rise to an inference of malice. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Carines*, *supra* at 759.

Again, the prosecution presented sufficient evidence to permit a reasonable juror to conclude that defendant committed arson in violation of MCL 750.77(1)(d)(*i*) when he set fire to his house on January 30. Further, the evidence presented at trial indicates that Kathy died from carbon monoxide poisoning as a result of the fire. Finally, the prosecution presented sufficient evidence to indicate that defendant intended to kill or otherwise harm Kathy when he set fire to the house. Defendant admitted that Kathy was in the house with him on January 30 and that she had been drinking that evening. Further, Kathy had a BAC of 0.30 at the time of her death. Defendant and Kathy often fought and defendant resented that he had to support Kathy financially. A reasonable juror could assume that when defendant intentionally set fire to the house, he was aware that Kathy was inside and was likely incapacitated. Therefore, a reasonable juror could also assume that defendant intended to kill or harm Kathy by setting fire to the house when she was inside, or that he knew when he set fire to the house that Kathy was inside and would likely be injured or killed in the fire.

Defendant also argues that his convictions are against the great weight of the evidence and that, accordingly, his convictions should be reversed and his case remanded for a new trial. For a verdict to be contrary to the great weight of the evidence, the evidence must preponderate so heavily against the verdict "that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). To determine whether a verdict is contrary to the great weight of the evidence, we review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). We may only vacate a conviction because it is against the great weight of the evidence if the verdict "'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.'" *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), quoting *Nagi v Detroit United R*, 231 Mich 452, 457; 204 NW 126 (1925). "'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial'" based on the weight of the evidence. *McCray*, *supra* at 638, quoting *Lemmon*, *supra* at 647.

Essentially, defendant argues that the expert testimony presented by the prosecution was unreliable and had been debunked by his experts, and he maintains that the circumstantial evidence used to convict him was weak and failed to establish that arson was the cause of the January 30 fire. At trial, defendant's expert, Jack Hughes, explained the reasons for his conclusion that the January 30 fire had only one point of origin, described the weaknesses in Proudfoot's investigation, and determined that the investigation was insufficient to conclude that defendant intentionally started the fire. However, Proudfoot explained why he did not agree with

Hughes' conclusion that the fire originated in the garage, spread to the basement, and burned the water heater. In particular, he described burn patterns in the ceiling joists of the basement indicating that a separate fire originated near the water heater. He also noted that Hughes' theory that fall-down from the ceiling ignited cardboard located below the water heater, which in turn burned the water heater, was inconsistent with both the burn patterns on the water heater and the absence of ashes below the water heater. Although these expert witnesses presented conflicting testimony, both witnesses provided support for their conclusions, and Proudfoot opined regarding the weaknesses in Hughes' theory. The jurors apparently agreed with Proudfoot's theories regarding the origins of the fire, and we will not interfere with their credibility determinations. See *Avant*, *supra* at 506.

The prosecution presented additional evidence that conflicted with evidence that defendant presented to support his acquittal. Although defendant consistently maintained that he did not start the January 30 fire, his statements are inconsistent with each other and with the other evidence presented at trial. For example, defendant initially claimed that he saw a fire in the basement near the furnace, but he later claimed that he saw the fire in the garage and not the basement. Further, defendant claimed that the door between the kitchen and breezeway locked behind him when he left the house, although forensic evidence indicated that the door was unlocked and ajar during the fire. Although defendant named other possible suspects, these suspects had alibis. Defendant's testimony that he and Kathy had a loving relationship and planned to marry was contradicted by other testimony indicating that his relationship with Kathy was violent and that she thought of leaving him.

Although defendant presented testimony that conflicted with evidence presented by the prosecution, this conflicting testimony is insufficient to grant a new trial based on the weight of the evidence. See *McCray*, *supra* at 638. Further, in the face of this conflicting testimony, the jury chose to believe the prosecution witnesses and the prosecution's theory of the case. Again, this Court may not interfere with the jury's credibility determinations. See *Avant*, *supra* at 506. Although defendant provided some evidence to support his acquittal, the evidence presented at trial did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. See *Musser*, *supra* at 218-219. Defendant's convictions are not against the great weight of the evidence, and remand for a new trial is not necessary.

III. Admission of Defendant's Statements to Proudfoot

Defendant argues that the trial court erred when it admitted evidence regarding his statements to Proudfoot on February 10 and 12, and that his counsel was ineffective for failing to move to suppress the admission of this evidence. We disagree. Because defendant failed to move to suppress the admission of this testimony at trial, this question is not preserved for our review. We review unpreserved claims for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Because the trial court did not grant defendant's post-trial motion for a new trial or a *Ginther*[3] hearing, review of defendant's claim that his counsel was ineffective is limited to errors

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Whether defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We first determine the facts and then decide whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* We review factual findings for clear error, and review constitutional determinations de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In reviewing a claim of ineffective assistance of counsel, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant argues that the statements that he made to Proudfoot on February 10 and 12 constituted an involuntary confession and should not have been admitted at trial. However, defendant did not confess to anything in either interrogation. Instead, he maintained throughout both conversations with Proudfoot that he did not start the January 30 fire. Accordingly, the admission of his statements did not violate his due process rights.

Although a confession must be given voluntarily in order to be admissible, "where the defendant's statements were admissions of fact, rather than a confession of guilt, no finding of voluntariness is necessary." *People v Gist*, 190 Mich App 670, 671; 476 NW2d 485 (1991). "An admission of fact is distinguished from a confession of guilt by the fact that an admission, in the absence of proof of facts in addition to those admitted by the defendant, does not show guilt." *Id.* at 671-672. In *Gist*, although the defendant claimed that his statements to the police that "The white guy that ran across the grass can't identify me." and "Where are the six money bags that were taken?" constitute an involuntary confession, this Court determined that "defendant's statements [did] not show that he committed the crime of which he was convicted," and, therefore, were mere admissions of fact. *Id.*

Similarly, defendant's statements to Proudfoot on February 10 and 12 did not constitute a confession. During both interviews, defendant maintained that he and Kathy were in the back bedroom when they heard a loud noise and saw smoke roll into the bedroom, that he left Kathy in the bedroom to investigate the incident, and that he went to the basement, only to discover that it was full of smoke and that either the furnace or something near it was on fire. Defendant also maintained that he then went upstairs, tried to reenter the kitchen through the breezeway door, and discovered that the door was locked. He then claimed that he ran outside and to the front porch in an attempt to reenter the house, suddenly turned, ran to the road, waved down a passing motorist, told her to call 911, and then ran back to the front porch, which he entered before losing consciousness. Defendant never admitted to Proudfoot that he started the January 30 fire, nor did he make any statement to indicate that he caused the fire, either intentionally or unintentionally.

Accordingly, in the absence of additional evidence, his statements to Proudfoot do not indicate that he was guilty of starting the January 30 fire; in fact, these statements support defendant's argument that he was not responsible for the fire. Defendant's statements to Proudfoot constitute an admission of fact, not a confession of guilt, and no finding of voluntariness is necessary. See *Gist*, *supra* at 671-672. Therefore, the trial court did not violate defendant's due process rights when it admitted recordings of the statements that defendant made

to Proudfoot on February 10 and 12 and permitted Proudfoot to testify regarding their contents. Defendant provided no other rationale to support his argument that the trial court should not have admitted evidence concerning these statements. Accordingly, the trial court did not err when it admitted this evidence.

Defendant also argues that his counsel was ineffective for failing to move to suppress these statements, but he fails to provide a successful argument to support his contention that the trial court's admission of these statements was in error. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Accordingly, defendant's counsel was not ineffective for failing to move to suppress this testimony.

IV. Admission of Proudfoot's Expert Witness Testimony

Defendant argues that the trial court erred when it admitted Proudfoot's testimony concerning his theory that defendant started the fire in the basement by pouring gasoline down the side of the water heater and igniting it, and that he received flashback burns when he ignited the gasoline. Apparently, defendant claims, Proudfoot's expert testimony was not supported by the evidence and constituted "a naked opinion outside of [his] expertise." We disagree. Defendant did not challenge Proudfoot's qualification as an expert witness regarding the cause and origin of fires or the admission of his testimony at trial. Accordingly, this issue is not preserved, and we review it for plain error affecting defendant's substantial rights. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006); *Carines*, *supra* at 763-764.

"Before permitting expert testimony, a trial court must find that the evidence is from a recognized discipline, relevant and helpful to the trier of fact, and presented by a qualified witness." *People v Daoust*, 228 Mich App 1, 9-10; 577 NW2d 179 (1998). MRE 702 governs the circumstances under which expert testimony is admissible:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Although the party offering the expert testimony has the burden of establishing its admissibility, the trial court has an obligation to ensure that any expert testimony admitted at trial is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004); *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007).

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached

through reliable principles and methodology. [*Dobek*, *supra* at 94, quoting *Gilbert*, *supra* at 782.]

Proudfoot's expert testimony regarding the cause and origin of the January 30 fire was properly admitted pursuant to MRE 702. The trial court properly concluded that in this arson case, testimony explaining the forensic evidence found at the scene and how it indicated the cause and origin of the fire would help the jury understand this evidence. Further, Proudfoot was qualified to testify as an expert regarding the cause and origin of fires. He was a detective sergeant and fire marshal for the Fire Marshal Division of the Michigan State Police, had completed both basic and advanced fire school, was certified as a fire investigator through the Michigan State Police certification program, and was a member of the International Association of Arson Investigators at the time he started the investigation. Accordingly, he had sufficient experience, training, and education to testify as an expert regarding the cause and origin of fires pursuant to MRE 702.

Proudfoot's theory that defendant started a fire by pouring gasoline down the side of the water heater and igniting it and that he received flashback burns when the gasoline ignited, is based on sufficient evidence that Proudfoot reliably applied to fire investigation principles and methods. Not only did Proudfoot testify regarding his observations concerning the damage caused by the January 30 fire, but he provided photographs and videotape to show the jury images of the forensic evidence he studied when conducting his investigation. Further, Proudfoot provided explanations at trial regarding burn patterns for different types of accelerants, the manner in which a fire spreads, and how debris, smoke, and other residue can be used to determine the location and positioning of people and objects at the time of the fire.

Proudfoot then described at trial how he used this information to determine that the burns on the water heater likely occurred when gasoline was splashed on the water heater and then ignited, and that the burns to defendant's arms and face were consistent with flashback burns that he likely received when he ignited the gasoline. He based his opinions regarding the cause and origin of the January 30 fire on reliable principles and methods, and he explained how his conclusions were based on the application of these principles and methods to the facts of the case. Accordingly, Proudfoot's testimony was proper pursuant to MRE 702, and the trial court did not plainly err when it permitted Proudfoot to testify concerning his theory regarding the cause and origin of the fire.[4]

V. Admission of Defendant's Threatening Remark

Defendant claims that the trial court erred when it admitted an audiorecording of a phone conversation that occurred between defendant and his son, Steve, when defendant was in jail as evidence of defendant's consciousness of guilt. We disagree. We review the trial court's

[4] To the extent that defendant argues that Proudfoot's theories were not based on reliable data and other information, we note that considerations regarding the weight to be given this evidence are properly left to the jury. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

decision to admit evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

"A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Although a threatening remark might simply "reflect the understandable exasperation of a person accused of a crime that the person did not commit," our Supreme Court has determined that "it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." *Id.*

Defendant argues that he was denied a fair trial when the trial court permitted the jury to listen to an audiorecording of his phone conversation with Steve. He claimed that during this conversation, he neither threatened to prevent Dan Devoid from testifying nor adopted the alleged death threats made by Steve and, therefore, his statements did not constitute a threat against Devoid.

However, defendant's statements, taken in context, constitute threats against Devoid. Defendant began the conversation with Steve by using disparaging names to describe Devoid. After Steve told him that he saw recently Devoid at a flea market but quickly left in order to prevent Devoid from seeing him, and commented that he did not want to see Devoid because he feared that he would "end up committing a crime," defendant responded by stating in an ominous voice, "Oh, I want to see him. I'm going to be looking for him when I get out." The portion of the audiorecording following defendant's comment is difficult to make out, but defendant and Steve apparently discussed "tak[ing] care of" something. Defendant then stated, "I know guys who don't like him too much either. He's pretty stupid 'cause he took us all out to where his parents live. That's, you know? That's just dumb." Steve immediately responded by noting, "500 will probably get something taken care of."

Defendant's statements, taken in the context of the entire conversation and in light of the fact that Devoid planned to testify at defendant's trial that defendant was at his house immediately before the February 18 fire began, indicate that defendant was angry at Devoid and wanted to confront him or to find someone to "take care of" him. Further, the conversation indicates that defendant and Steve considered implementing a plan to find someone to "take care of" Devoid. Accordingly, the trial court did not err when it determined that defendant's statement that he would be "looking for" Devoid when he was released from jail constituted a threat. Further, it did not err when it determined that the rest of the conversation, including Steve's statements, was admissible for a non-hearsay purpose, namely, to put defendant's threat in context.

This evidence of defendant's threat against Devoid was relevant under MRE 401 to determine defendant's consciousness of guilt. At the time defendant made these remarks, Devoid had already testified at the preliminary examination that that he, Steve, and defendant were at defendant's house immediately before the February 18 fire. A reasonable juror could infer from defendant's threatening remarks against Devoid that defendant wanted to harm Devoid for testifying because Devoid's anticipated testimony, which placed defendant at his house immediately before the February 18 fire, was true and indicated that defendant intentionally set fire to the remains of his house that day. Further, although the admission of defendant's threatening remarks is prejudicial because it might induce jurors to infer that

defendant had a bad character, the probative value of these remarks to determine defendant's consciousness of guilt is not substantially outweighed by the danger of unfair prejudice. Accordingly, these statements are admissible pursuant to MRE 403.

In addition, the trial court properly instructed the jury to only consider defendant's statements during the conversation to determine his consciousness of guilt. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we conclude that the jury did not consider this evidence for an improper purpose and that the trial court's decision to admit this audiorecording did not constitute error requiring reversal.

VI. Prosecutorial Misconduct

Defendant argues that three comments made by the prosecutor during his closing argument constitute instances of prosecutorial misconduct requiring reversal of his convictions and remand for a new trial. We disagree. Because defendant failed to challenge the propriety of the prosecutor's remarks at trial, he failed to preserve this issue for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved claims of error for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). To determine if a prosecutor committed misconduct, "the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* at 272-273. "'Prosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he 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). During closing argument, the prosecutor is also permitted to comment on the evidence presented at trial and on the witnesses' credibility. *People v Green*, 131 Mich App 232, 236-237; 345 NW2d 676 (1983). "A prosecutor may also argue that the evidence was uncontradicted even though the defendant is the only person who could have contradicted the evidence." *Id.* at 237. However, the prosecutor "may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *Id.*

To determine if a prosecutor's comments during his closing argument were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship that these comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant argues that the prosecutor committed misconduct by telling the jury during his closing argument that defendant had to disprove the prosecution's theory that he started a second fire at the water heater and that defendant failed to produce evidence during the trial to establish

his innocence. In particular, he challenges the following portion of the prosecution's closing argument:

> Obviously, the big question is how do we know the Defendant did it in this case and, on January 30th of 2000, I, I would be interested to see if, if Mr. Barberi has any evidence that he thinks points to anyone but the Defendant in this case because I, I just don't see it. I don't see anything that indicates that anyone else did this.
>
> You heard testimony yesterday and, and before about the water heater fire and, clearly, they have to disprove the water heater fire. It's the essence of their defense. They have to disprove it because clearly there's a fire in the garage and if they, if there's a fire in the basement, it just, it's impossible to believe their defense.

The prosecutor's argument in the first paragraph of the cited passage was proper. The prosecutor merely discussed the evidence presented at trial indicating that defendant set fire to his home and the lack of evidence indicating that another person or source caused the fire. This statement constitutes permissible commentary regarding the evidence presented at trial. See *Green, supra* at 237.

Whether the prosecutor's comments in the second paragraph of the cited passage constituted misconduct is a close question. The prosecutor argued that defendant had to "disprove the water heater fire." This statement, taken alone, would impermissibly shift the burden of proof by implying that defendant must "present a reasonable explanation for damaging evidence." *Id.* at 237. However, to determine if this statement by the prosecutor constitutes misconduct, his statements must be evaluated in context. See *Brown* at 152. The prosecutor's remarks could be viewed as a response to the following portion of defense counsel's opening argument:

> As our learned Trial Judge Chamberlain has already told you, neither Mr. Spencer nor myself have to prove anything and that you cannot, you cannot return a verdict of guilty on any of the charges that have been brought by the State unless the Prosecutor proves each and every element of all the crimes charged beyond a reasonable doubt and that my client is presumed as he sits here today to be innocent. I could rely on that. But I'm going to tell you right now I'm not going to rely on the presumption of innocence. I'm not going to rely on the Prosecutor's burden of proof. My client, Fred Spencer, sits here this morning in this very courtroom an innocent man and I am going to prove that to you during this trial.

By claiming that defendant had to "disprove the water heater fire" to support his contention that he was not guilty of the charged offenses, the prosecutor could have been responding to defense counsel's assertion in his opening argument that he would "prove" defendant's innocence at trial.

However, we need not address on the merits the question whether the aforementioned comment by the prosecutor was proper, because any error was harmless. This brief comment, stated at the beginning of an otherwise proper argument explaining that the evidence presented at

trial did not lead to the conclusion that an unknown individual entered the house and set fire to the water heater, did not deny defendant the right to a fair and impartial trial. Further, the trial court's instructions to the jury cured any potential error. Although a defendant may be denied a fair trial if the prosecutor makes a clear misstatement of the law that remains uncorrected, even an erroneous legal argument made by the prosecutor can potentially be cured if the jury is correctly instructed on the law. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). In the jury instructions, the trial court properly instructed the jury that defendant was presumed to be innocent and did not have to prove that he did not commit the charged offenses. Further, the trial court properly instructed the jury that the prosecution's closing statement is not evidence. See MCR 6.414(G). "It is well established that jurors are presumed to follow their instructions." *Graves*, *supra* at 486. Therefore, we conclude that the jury did not consider the prosecutor's closing statement as evidence when deliberating and disregarded any assertions and arguments unsupported by the evidence. The court's instructions were sufficient to protect defendant's substantial rights and to ensure that any potential error caused by the prosecutor's comment did not deny defendant a fair and impartial trial.

Defendant also argues that the prosecutor committed misconduct by responding to defense counsel's assertions during closing argument of a lack of evidence in the case with the comment that the "only lack of evidence in the case is the lack of evidence that anybody else did this other that [sic] the Defendant." However, defense counsel repeatedly stated during his closing argument that there was a lack of evidence in the case. The prosecutor's statement constituted permissible commentary on the evidence in response to defense counsel's closing argument and did not impermissibly suggest to the jury that defendant failed to prove his innocence. See *Green*, *supra* at 237.

Finally, defendant argues that his counsel was ineffective for failing to challenge the aforementioned instances of alleged prosecutorial misconduct. Because the prosecutor's arguments did not constitute misconduct, defendant's claim that his counsel was ineffective for failing to object to the prosecutor's arguments lacks merit. See *Riley*, *supra* at 142.

VII. Prearrest Delay

Finally, defendant argues that he was denied due process because he was arrested five years after these fires occurred. We do not agree. "A challenge to a prearrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Both the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 20, guarantee the right to a speedy trial. *People v Cleveland Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Generally, a defendant must be arrested to invoke the speedy trial guarantee. *United States v Marion*, 404 US 307, 320; 92 S Ct 455; 30 L Ed 2d 468 (1971). Restrictions on prearrest delay are primarily governed by the applicable limitation periods adopted by the Legislature. *Id.* at 322. However, "due process provides limited protection against oppressive prearrest delay." *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746, rev'd on other grounds 469 Mich 437 (2003).

To establish a due process violation meriting dismissal of the charges, a defendant must first "demonstrate both actual and substantial prejudice that impairs the defendant's right to a fair trial." *Id.*

> Substantial prejudice is prejudice of a kind or sort that the defendant's ability to defend against the charges was so impaired that it likely affected the outcome of the trial. Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence. [*Id.* (citations omitted).]

To establish whether actual and substantial prejudice impairs a defendant's right to a fair trial, the court must balance the actual prejudice to the defendant against the state's reasons for the delay. *United States v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *Cain*, *supra* at 108. The defendant bears the initial burden of demonstrating prejudice; then, the prosecutor "bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice results." *Cain*, *supra* at 109, quoting *People v McIntire*, 232 Mich App 71, 93; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999).

However, defendant cannot merely present general allegations in order to establish that prejudice occurred. Instead, he must present "specific references to instances of prejudice-generating occurrences" and "specific allegations of actual prejudice resulting therefrom." *People v Loyer*, 169 Mich App 105, 119-120; 425 NW2d 714 (1988). Otherwise, "the prosecution would be at an insuperable disadvantage indeed in attempting to show how such unspecified prejudice was in fact justified." *Id.* at 120. A defendant must also show that "the prosecution intended to gain a tactical advantage by delaying formal charges." *Tanner*, *supra* at 414-415.

Initially, we note that Proudfoot and Carter, the two investigators in this case, kept this case open for five years to gather enough evidence to arrest defendant. The evidence supports their claims that they worked on this case regularly and periodically (at least every few months) from the time of the January 30 fire until defendant's arrest.

Defendant claims that the five-year "delay" before his arrest compromised his right to a fair trial. First, defendant claims that the prearrest delay "erode[d] [his] ability to discover exculpatory evidence and present it at trial" by precluding his arson investigator from investigating the scene of the fire and forcing him to rely on photographs alone. However, defendant fails to identify evidence that his arson investigator hoped to find at the scene that he could not have garnered from the photographs. Further, defendant fails to explain if, and to what extent, the remains of the burned house still existed or, alternately, the extent to which the February 18 fire destroyed evidence integral to the investigation of the January 30 fire, hindering the investigation for both parties. Because defendant failed to establish that he suffered outcome-determinative prejudice because his arson investigator allegedly could not investigate the burned home and that the investigator's inability to investigate the burned home was a result of the prearrest delay, he failed to establish the substantial prejudice needed to support his allegation of a due process violation.

Defendant also alleged that the five-year prearrest delay gave the investigators the opportunity to "attempt[] to mold witnesses' memories to fit the preconceived notion,

unsupported by the evidence, that Defendant was guilty." Defendant alleged that the investigators were "ultimately successful" at getting Devoid to change his testimony, and Devoid testified at trial that defendant was at his house on February 18, 2000, just before the house again caught on fire. However, the jury acquitted defendant of arson with respect to the February 18 fire, and defendant fails to explain how Devoid's allegedly altered testimony affected the jury's determination that defendant was guilty of arson and felony murder with respect to the January 30 fire. Accordingly, defendant failed to establish that the five-year delay affected the outcome of the trial and denied him of his right to due process.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis